

San Francisco Law Library

436 CITY HALL

No. 133361

EXTRACT FROM RULES

Rule 1a. Books and other legal material may be borrowed from the San Francisco Law Library for use within the City and County of San Francisco, for the periods of time and on the conditions hereinafter provided, by the judges of all courts situated within the City and County, by Municipal, State and Federal officers, and any member of the State Bar in good standing and practicing law in the City and County of San Francisco. Each book or other item so borrowed shall be returned within five days or such shorter period as the Librarian shall require for books of special character, including books constantly in use, or of unusual value. The Librarian may, in his discretion, grant such renewals and extensions of time for the return of books as he may deem proper under the particular circumstances and to the best interests of the Library and its patrons. Books shall not be borrowed or withdrawn from the Library by the general public or by law students except in unusual cases of extenuating circumstances and within the discretion of the Librarian.

Rule 2a. No book or other item shall be removed or withdrawn from the Library by anyone for any purpose without first giving written receipt in such form as shall be prescribed and furnished for the purpose, failure of which shall be ground for suspension or denial of the privilege of the Library.

Rule 5a. No book or other material in the Library shall have the leaves folded down, or be marked, dog-eared, or otherwise soiled, defaced or injured, and any person violating this provision shall be liable for a sum not exceeding treble the cost of replacement of the book or other material so treated and may be denied the further privilege of the Library.

— — — — —

Digitized by the Internet Archive
in 2010 with funding from
Public.Resource.Org and Law.Gov

7450
No. 11658

United States
Circuit Court of Appeals
For the Ninth Circuit.

GLENS FALLS INDEMNITY COMPANY, a
Corporation,

Appellant,

vs.

BASICH BROTHERS CONSTRUCTION COM-
PANY, a Corporation,

Appellee.

Transcript of Record

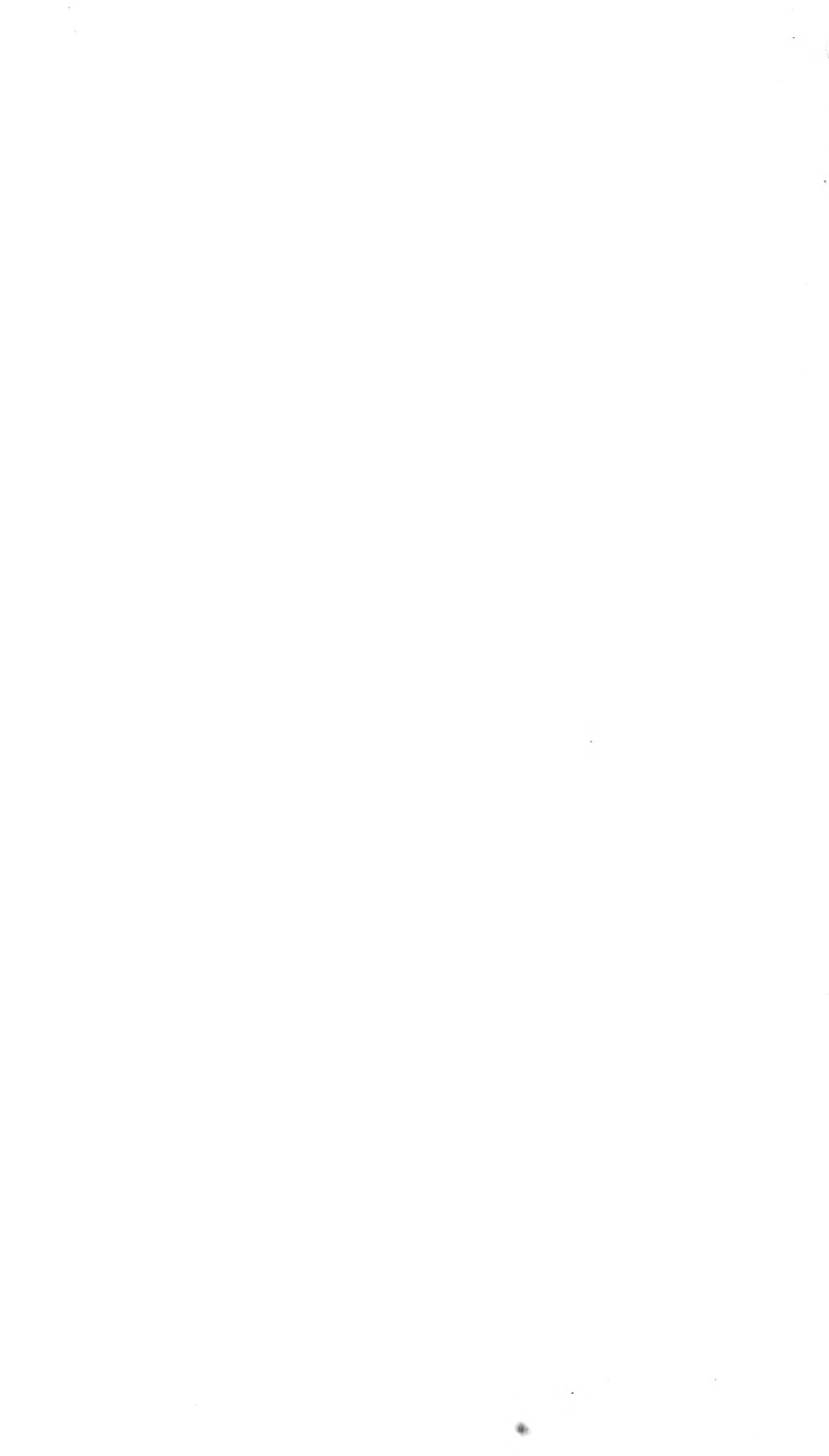
In Two Volumes

Volume I

Pages 1 to 432

FILED
SEP - 9 1947
PAUL P. O'BRIEN,
CLERK

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division



No. 11658

United States
Circuit Court of Appeals
For the Ninth Circuit.

GLENS FALLS INDEMNITY COMPANY, a
Corporation,

Appellant,

vs.

BASICH BROTHERS CONSTRUCTION COM-
PANY, a Corporation,

Appellee.

Transcript of Record

In Two Volumes

Volume I

Pages 1 to 432

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division

INDEX

PAGE

Bill of Particulars—(Continued):

VII—Equipment Rental Fully Operated 2/12/45 to 5/19/45 ..	59
VIII—Equipment Rental Not Fully Operated 3/29/45 to 6/9/45	61
IX—Equipment Rental Royalty Basis	62
X—Equipment Rental Fully Operated 2/12/45 to 5/19/45. Not Fully Operated 5/9/45 to 6/10/45	62
XI—Equipment Rental Fully Operated by Basich Bros. 2/21/45 to 6/6/45	66
XII—Equipment Rental Fully Operated 4/6/45 to 4/24/45 ...	68
XIII—Equipment Rental Not Fully Operated 4/24/45 to 6/9/45	68
XIV—Equipment Rental Not Fully Operated 4/6/45 to 5/8/45 .	69
XV—Equipment Rental Fully Operated 6/9/45 to 9/16/45 ..	69
XVI—Equipment Rental Not Fully Operated 6/9/45 to 9/8/45 .	69
XVII—Equipment Rental Royalty Basis	69
XVIII—Equipment Rental Not Fully Operated 6/15/45 to 9/17/45	70

INDEX

PAGE

Bill of Particulars—(Continued):

XIX—Equipment Fully Operated 6/9/45 to 9/6/45	70
XX—Equipment Rental Royalty Basis	70
XXI—Equipment Rental Fully Op- erated 6/8/45 to 9/12/45 ..	70
XXII—Equipment Rental Fully Op- erated 6/15/45 to 8/9/45 ..	70
XXIII—Equipment Rental Not Fully Operated 6/9/45 to 9/10/45	70
XXIV—Equipment Rental Not Fully Operated 6/15/45 to 9/8/45	71
XXV—Equipment Rental Not Fully Operated 7/6/45 to 9/17/45	71
XXVI—Repairs Made by Others on Equipment	71
XXVII—Parts Purchased for Equip- ment Not Fully Operated 2/14/45 to 6/4/45	71
XXVIII—Parts Taken from Stock	72
XXIX—Fuel, Grease, Oil on Equip- ment Not Fully Operated 4/9/45 to 5/31/45	72
XXX—Miscellaneous Labor, Invoices, etc., 2/26/45 to 6/16/45	72

	INDEX	PAGE
Bill of Particulars—(Continued):		
XXXI—Freight on Rented Equipment		74
XXXII—Repairs Made by Others on Equipment Not Fully Op- erated 6/9/45 to 9/10/45 ...		74
XXXIII—Parts Purchased for Equip- ment Not Fully Operated 6/16/45 to 9/19/45		75
XXXIV—Parts Taken from Stock		75
XXXV—Fuel, Grease and Oil on Equipment Not Fully Op- erated 6/7/45 to 9/6/45 ...		75
XXXVI—Miscellaneous Labor, Invoices, etc., 6/7/45 to 9/17/45		75
XXXVII—Freight on Rented Equipment		78
XXXVIII—Production Gravel Base		79
XXXIX—Production Gravel Stabilized Base		80
XXXX—Production Gravel Embank- ment		80
XXXXI—Production Concrete Aggre- gate		81
XXXXII—Production Mineral Aggre- gate		82
XXXXIII—Production Concrete Aggre- gate for Structures		82
XLIV—Miscellaneous Credits		83

INDEX

PAGE

Certificate of Clerk	222
Complaint for Recovery of Money and on Bond	2
Exhibit A—Subcontract Agreement	17
Exhibit B—Subcontract Bond	32
Decision and Order for Judgment and Findings	186
Exhibits, Defendant:	
A—Letter of 5/3/45 to Duque & Frazzini in Answer to Letter of 5/1/45	876
B—Confirmation of Verbal Agreement Between Mr. N. L. Basich and Duque & Frazzini	877
C—Recapitulation of Production Items Mentioned in Article XXIII of the Subcontract Dated 2/7/45	878
D—Schedule of Payments Made by Basich Bros. on Behalf of Duque & Frazzini 2/11/45 to 3/7/45	879
Exhibits, Defendant's, Attached to Kovick Deposition:	
A—Letter of 5/12/45 to Duque & Frazzini	582
B—Letter of 5/12/45 to Duque & Frazzini	583
Exhibits, Plaintiff's:	
No. 1—Subcontract Agreement (Set Out as Exhibit A, Attached to Complaint for Recovery on Page 17)	461
No. 2—Subcontract Bond (Set Out as Exhibit B, Attached to Complaint for Recovery on Page 32)	461

	INDEX	PAGE
Exhibits, Plaintiff's—(Continued):		
No. 3—Letter to Basich Bros. Co. 3/7/45		462
No. 4—Letter to Duque & Frazzini 4/5/45		463
No. 5—Letter to Duque & Frazzini 4/27/45		464
No. 6—Letter to Mr. Monteleone 5/8/45 .		467
No. 7—Letter to Mr. J. E. McCall 5/15/45		469
No. 8—Letter to Duque & Frazzini 5/23/45		471
No. 9—Letter to Duque & Frazzini 5/24/45		474
No. 10—Letter to Duque & Frazzini 6/1/45		477
No. 11—Letter to Basich Bros. Co. 6/7/45		479
No. 12—Letter to Duque & Frazzini 6/8/45 and Attached Letter from War Dept. U. S. Engineer Office 6/7/45		482
No. 13—Letter to Duque & Frazzini 6/9/45		491
No. 14—Letter to Glens Falls Ind. Co. 6/11/45		494
No. 15—Letter to Mr. John E. McCall 6/11/45		497
No. 16—Letter to Glens Falls Ind. Co. 6/14/45		500
No. 17—Letter to Basich Bros. Co. 6/23/45		502
No. 18—Letter to Mr. John E. McCall 6/29/45		504
No. 19—Workmen's Compensation Policy		507
No. 20—Construction Contract War De- partment, Form No. 2		541

INDEX

PAGE

Exhibits, Plaintiff's—(Continued):

No. 21—Stipulation to Take Deposition of Nick L. Basich	556
Deposition of Nick L. Basich.....	558
No. 22—Stipulation to Take Deposition of George W. Kovick	611
Deposition of George W. Kovick.....	613
—direct	614
—cross	668
—redirect	672, 673, 677
—recross	673, 675, 679
No. 23—Deposition of John H. Bray, Wit- ness, Plaintiff	684
No. 24—Deposition of Carson Frazzini ..	754
—direct	756
—cross	843
—redirect	866
Findings of Fact and Conclusions of Law	193
Conclusions of Law	211
Findings of Fact	194
First Amended Answer of Defendant Glens Falls Indemnity Company, a Corporation ..	89
Exhibit No. 1—Registered Letter 4/5/45 ..	116
Exhibit No. 2—Letter to Duque & Fraz- zini 4/27/45	117
Judgment	212
Letter Dated 10/8/46 from J. E. McCall to Mr. Stephen Monteleone	125

INDEX	PAGE
Memorandum Answering Letter of 10/8/46 ...	127
Memorandum of Defendant Glens Falls Indemnity Company, a Corporation, Re Plaintiff's Bill of Particulars	146
Names and Addresses of Attorneys	1
Notice of Appeal	215
Notice to Produce	84
Request for Admission Under Rule 36	86
Reporter's Transcript of Pre-Trial Hearing ..	224
Reporter's Transcript of Proceedings:	
Oct. 14, 1946, Judge Hall	243
Nov. 7, 1946, Judge Yankwich	255
Nov. 25, 1946, Judge Yankwich	280
Feb. 4, 1947, Judge Yankwich.....	312
Feb. 5, 1947, Judge Yankwich (Partial) ..	440
Statement of Points on Which Appellant Intends to Rely	215
Statement of Points on Which Appellant Intends to Rely on Appeal	880
Stipulation and Order	221
Stipulation—Defendant May File Amended Answer	88
Stipulation (Unsigned) Filed 10/14/46	123

INDEX

PAGE

Witness, Defendant:

Vernon, Lawrence H.

—direct 434

—cross 438

Witnesses, Plaintiff:

Basich, Nickola L.

—direct 416

—cross 430

Popovich, George J.

—direct 317

—cross 360

—redirect 401

Woolums, Bart C.

—direct 406

—cross 411

—redirect 415



NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

JOHN E. McCALL,

JOSEPH J. BURRIS,

458 S. Spring St.,

Los Angeles 13, Calif.

For Appellee:

STEPHEN MONTELEONE,

TRACY J. PRIEST,

714 West Olympic Bldg.,

Los Angeles 15, Calif.

In the District Court of the United States, Southern
District of California, Central Division.

No. 5021-PH Civ.

BASICH BROTHERS CONSTRUCTION

COMPANY, a corporation,

Plaintiff,

vs.

GLENS FALLS INDEMNITY COMPANY, a
corporation, and ANDREW DUQUE and
CARSON FRAZZINI, co-partners doing busi-
ness under the name of DUQUE & FRAZZINI,
Defendants.

COMPLAINT FOR RECOVERY OF MONEY
AND ON BOND

Comes now the plaintiff herein and, for cause of
action against said defendants, and each of them,
complains and alleges:

I.

That plaintiff, Basich Brothers Construction
Company now is and, at all times herein mentioned
was, a corporation of the State of California and
organized and existing under and by virtue of the
laws of said state with its principal place of busi-
ness in the City of Alhambra, County of Los Ange-
les, State [2*] of California; that it was, at all

* Page numbering appearing at foot of page of original certified
Transcript of Record.

times herein mentioned and now is a citizen and resident of the State of California.

II.

That the defendant, Glens Falls Indemnity Company, at all times herein mentioned, has been and now is a corporation duly organized, existing and doing business under and by virtue of the laws of the State of New York, having its principal place of business in the City of Glens Falls, State of New York, and authorized to transact a general bonding business within the states of California and Arizona; that it was, at all times herein mentioned and now is, a citizen and resident of the State of New York.

III.

That at all times herein mentioned said defendants Andrew Duque and Carson Frazzini have been and now are a co-partnership and have been and now are citizens and residents of the State of Nevada, with their principal place of business at Tonopah, State of Nevada.

IV.

That the herein action is between citizens of different states and the matter in controversy exceeds, exclusive of interest and costs, the sum or value of \$4000.00.

V.

That on or about the 25th day of January, 1945, said plaintiff, Basich Brothers Construction Com-

pany, a corporation, entered into a certain written contract with the United States of America by and through the Engineering Department thereof, for the furnishing of materials and performing of work for the construction of taxiways, warmup and parking aprons, airfield lighting, drainage facilities and water service lines, together with appurtenant facilities necessary at what is known as Davis-Monthan Airfield at or near Tucson, Arizona, said contract being known as [3] No. W-04-353 Eng. 1302 and having job No. Davis-Monthan E.S.A. 210-6, 210-8 and 210-9. That a copy of said contract is not attached hereto for the reason of its voluminous character. That said defendants and each of them know the contents thereof.

VI.

That on or about the 7th day of February, 1945, said plaintiff, Basich Brothers Construction Company, a corporation, and said defendants, Duque & Frazzini, a co-partnership, entered into a written subcontract for the performance of certain work and the furnishing of certain material as set forth in said subcontract. That the work to be performed and the material to be furnished under said last mentioned contract was essential to the performance by plaintiff Basich Brothers Construction Company, a corporation, of the work required to be performed by it under its said contract with the United States of America. That a copy of said subcontract between plaintiff and said Duque & Frazzini is hereto attached, marked Exhibit "A" and

made a part hereof to the same force and effect as though set out herein at length.

VII.

That on or about February 20, 1945, and in conformity with the requirements of Article XXIII of said subcontract marked Exhibit "A" and hereto attached, defendant Glens Falls Indemnity Company, a corporation, for a valuable consideration paid to it as a premium, made, executed and delivered to plaintiff within said District of California, Southern District thereof, Central Division, as Surety, and said Duque & Frazzini, as Principal, a certain contract bond in the penal sum of \$101,745.55 for the faithful performance of the work contracted to be done under the terms of said subcontract hereto attached and marked Exhibit "A". A copy of said bond is hereto attached and marked Exhibit "B" and made a part hereof; that on or about [4] March 7, 1945, defendant, Glens Falls Indemnity Company, a corporation, modified in writing said bond marked Exhibit "B" and hereto attached, by adding thereto the following: "It is hereby understood and agreed that the 10 days appearing in paragraph "First" is changed to read "twenty (20) days."

VIII.

That at all times herein mentioned following the date of the execution and delivery of said bond by defendant Glens Falls Indemnity Company, a corporation, to plaintiff, Basich Brothers Construc-

tion Company, a corporation, as aforesaid, said bond remained in full force and effect and is still in full force and effect, and said plaintiff, at all of said times, duly performed, complied with and fulfilled all of the conditions and stipulations in said bond contained on its part to be performed.

IX.

That by the terms of Article XII of said subcontract marked Exhibit "A", it is provided, among other things, that said Duque & Frazzini would prosecute said work continuously with sufficient workmen and equipment to insure its completion, and that plaintiff had the right to compel them to move in another plant; it is further provided in Article XXI thereof, among other things, that said Duque & Frazzini would erect two plants, each to produce 800 cubic yards of suitable material a day to be used in connection with said government project; that it is further provided in Article I thereof, among other things, that the provisions of said contract between plaintiff and the United States of America and the plans and specifications therein referred to are made a part of said subcontract marked Exhibit "A" and hereto attached, and that said Duque & Frazzini would furnish all material, supplies and equipment, and perform all labor required of them under said subcontract, a copy of which is hereto attached and marked Exhibit "A", to the satisfaction of the Government's Engineer or other authorized representative of the Government in charge of said project. It is therein

further provided in Article II thereof, that the work shall be commenced not later than February 19, 1945, and shall be completed on or before June 3, 1945. That by the provisions of Article XXV of said subcontract between plaintiff and said Duque & Frazzini, time is expressly made of the essence thereof.

X.

That said Duque & Frazzini entered upon the performance of the requirements of their said subcontract with plaintiff, a copy of which is hereto attached and marked Exhibit "A", but failed to prosecute said work therein required of them continuously with sufficient workmen and/or equipment, or to erect two plants each capable of producing 800 cubic yards of suitable material a day. That after commencing work under said contract and, on or about April 5, 1945, said Duque & Frazzini failed to have or thereafter to maintain sufficient workmen and/or sufficient equipment, as in said subcontract marked Exhibit "A" and hereto attached required of them.

XI.

That said Duque & Frazzini and/or said Glens Falls Indemnity Company, after said Duque & Frazzini commenced work, as aforesaid, failed and neglected to pay labor, equipment and material bills on account of labor performed and/or materials and/or equipment furnished to them in connection with the performance of their said sub-

contract with plaintiff, and failed to faithfully perform the work and requirements contracted to be done, as aforesaid. That on account of the failure of said Duque & Frazzini to perform faithfully the work contracted to be done as hereinbefore more specifically set forth, plaintiff did, under date of April 5, 1945, by registered mail, notify said defendants and each of them, that the plant of said Duque & Frazzini [6] was not producing 800 cubic yards of suitable material as required by said subcontract, and that they move in additional equipment to insure proper completion of their said subcontract.

XII.

That said defendants Duque & Frazzini, thereafter continued to work under the said subcontract with plaintiff, and as plaintiff is informed and believes and upon such information and belief alleges, the defendant, Glens Falls Indemnity Company, at all times herein mentioned, through its duly authorized agents and representatives, fully investigated the facts and conditions relative to the default as herein alleged, of said Duque & Frazzini under the terms of the aforesaid subcontract with plaintiff and said contract bond, and was thereby fully advised of all of the facts thereto pertaining.

XIII.

That on or about April 27, 1945, said Duque & Frazzini having still failed to faithfully perform the work contracted to be done under their said

subcontract with plaintiff, plaintiff did under date of April 27, 1945, by registered mail, notify said defendants, and each of them, of the failure of said Duque & Frazzini to faithfully perform the work required of them, and that plaintiff would make all reasonable efforts, either in attempting to procure sufficient equipment to produce the deficiency in material required of said Duque & Frazzini, as aforesaid, or attempt to procure the deficiency of materials through other sources and make all charges or other reasonable expenses in connection therewith against said defendants.

XIV.

That by reason of the failure of said Duque & Frazzini to perform faithfully the work contracted to be done under their said contract with plaintiff, as aforesaid, and at their own expense to furnish all necessary material and perform all necessary labor incidental thereto, it became necessary for plaintiff to furnish necessary labor, material and equipment for the purpose of completing the work contracted to be done by said Duque & Frazzini under their said subcontract with plaintiff; that from the commencement by said Duque & Frazzini of the work required by them under said subcontract with plaintiff on or about February 19, 1945, until the suspension of said work and the abandonment thereof by said Duque & Frazzini on or about June 8, 1945, as herein alleged, by reason of the failure of said Duque & Frazzini to perform faithfully the work contracted to be done under said

subcontract and to, at their own expense furnish all materials, supplies and equipment, and perform all labor as therein required of them, it became necessary for plaintiff to pay and plaintiff did pay certain necessary materials, supplies and equipment used and/or employed by said defendants Duque & Frazzini, during said period commencing on or about February 19, 1945, to on or about June 8, 1945, for the purpose of completing the work contracted to be done by said Duque & Frazzini under said subcontract.

XV.

That during said period of time from the commencement of said work as aforesaid, to on or about June 8, 1945, plaintiff furnished and paid for necessary labor, materials, supplies and equipment for the performance by said Duque & Frazzini of the requirements imposed on them by their subcontract with plaintiff, the following items: (a) Labor, \$46,053.20; Insurance, \$6529.59; (b) Repairs on Equipment, \$275.51; (c) Parts of Equipment purchased, \$2257.88; (d) Parts of Equipment furnished by plaintiff to said Duque & Frazzini, \$1723.75; (e) Fuel, grease and oil for Equipment, \$732.47; (f) Rental of Equipment by plaintiff to said Duque & Frazzini, fully operated, \$3989.41; (g) Rental of Equipment by plaintiff to said Duque & Frazzini not fully operated, \$2773.86; (h) Rental of Equipment [8] on tonnage basis, \$4191.60; (i) Rental of Equipment by Duque & Frazzini from (1) P.D.O.C. fully operated,

\$6902.37, (2) P.D.O.C. not fully operated, \$261.34, (3) J. G. North & Sons, \$4956.06, (4) A. B. Bonner, \$625.74, (5) Bressi & Bevanda, \$582.72, (6) Industrial Equipment Co., \$176.00; (j) Miscellaneous Labor, \$2104.40; (k) Freight on Equipment, \$326.89. That the above items total \$85,172.63.

XVI.

That during the period from the commencement of said work by Duque & Frazzini on or about February 19, 1945, to the abandonment thereof, as aforesaid, on or about June 8, 1945, said defendants had earned, under their said subcontract with plaintiff a gross amount of \$48,716.22. That said gross earnings consist of the following items:

Item I: Gravel Embankment, 3000 cubic yards at contract price of \$0.46 a cubic yard, or \$1380.00;

Item II: Gravel, Stab. Base, 7587 cubic yards at contract price of \$0.40 a cubic yard, or \$3034.80;

Item III: Gravel Base Course, 38,407 cubic yards at contract price of \$0.46 a cubic yard, or \$17,667.22;

Item IV: Concrete, aggregate 21,735 cubic yards at contract price of \$1.05 a ton, or \$22,821.75;

Item V: Mineral aggregate 4586 tons at contract of \$0.65 a ton, or \$2980.00;

Item VI: Rock Base, A. C. LaRue, 309 cubic yards, at \$0.46 a cubic yard, or \$142.14;

Item VII: Sand, Seal Coat, 110 tons at \$0.65 a ton, or \$71.50;

Item VIII: Credit, Maintainer, \$525.00;

Item IX: Credit, Labor, \$92.91;

That pursuant to the provisions of Article XI of said subcontract, plaintiff elected to and did apply said gross earnings [9] of \$48,716.22 to the credit of said Duque & Frazzini in payment of all of the above charge items with the exception of Item (a) above being Labor and Insurance, there being a balance due plaintiff thereon on account of the deficiency between the amounts paid out by plaintiff for labor, supplies, materials and equipment, as aforesaid, in the sum of \$85,172.63, and said gross earnings of \$48,716.22, or \$36,456.41.

XVII.

That on or about the 8th day of June, 1945, before the completion of the work provided for in their said subcontract with plaintiff, said Duque & Frazzini notified plaintiff in writing that they were suspending their said operations and thereupon and on or about said 8th day of June, 1945, without the consent of plaintiff, they abandoned said operation; that defendant Glens Falls Indemnity Company were, at all times, promptly notified by registered mail of the aforesaid acts and omissions of said Duque & Frazzini, and upon the suspension and abandonment of said operations by Duque & Frazzini, as aforesaid, plaintiff on June 11, 1945, notified said Glens Falls Indemnity Company by registered mail, that, as the surety of said Duque & Frazzini, it take such action as it may deem proper and that until it did so plaintiff, as Prime Contractor, upon demand of the War Department, would proceed with the work for the benefit of each of

said defendants and would comply with their reasonable instructions. Said defendant Glens Falls Indemnity Company, however, took no action whatever in the completion of the work, abandoned by said Duque & Frazzini as aforesaid, and plaintiff was compelled to complete the same; that said plaintiff did, at its own expense, furnish labor, material and equipment to complete, and did complete the work covered by its said subcontract with Duque & Frazzini hereto attached and marked Exhibit "A". That in completion thereof after its abandonment as aforesaid, and in payment [10] of labor and material and rental of equipment and miscellaneous bills necessarily incident thereto, plaintiff necessarily expended the respective amounts and furnished labor, material, machinery and equipment as follows:

(a) Labor \$20,452.70, Insurance \$2,593.86, (b) Repairs on Equipment, \$186.43 and \$3,969.97, respectively, (c) Parts for Equipments \$4,244.10, (d) Fuel, Grease and Oil for Equipment, \$1,371.50, (e) Rental on Equipment from plaintiff fully operated, \$18,485.17, (f) Rental of Equipment by Plaintiff not fully operated, \$2849.56, (g) Rental of Equipment by plaintiff on tonnage basis, \$6753.20, (h) Rental of Equipment from (1) P.D.O.C. fully operated, \$10,412.57, (a) P.D.O.C. not fully operated, \$108.50, (3) P.D.O.C. on tonnage basis, \$5349.73, (4) J. G. North & Sons, \$27,809.54, (5) Phoenix-Tempe Stone, \$6,102.05, (6) Bressi-Bevanda, \$1,152.61, (7) Martin Construction Company, \$270.00, (8) Axman-Miller, \$700.00, (i) Mis-

cellaneous labor, \$4,803.15, (j) Freight on equipment, \$663.39. That the above items total \$118,278.03.

XVIII.

That during the period from the abandonment of said work by said Duque & Frazzini on or about June 8, 1945, as aforesaid, until the completion thereof by plaintiff, as aforesaid, there was a gross earning based on said subcontract in the sum of \$76,230.73, consisting of the following items:

Item I, Gravel embankment, 7260 cubic yards at contract price of \$0.46 a cubic yard or \$3339.60; Item II, Gravel, Stab. Base, 4869 cubic yards at contract price of \$0.40 a cubic yard or \$1947.60; Item III, Gravel Base Course, 16357 cubic yards at contract price of \$0.46 a cubic yard or \$7524.22; Item IV, Concrete Aggregate, 46005 cubic yards at contract price of \$1.05 a cubic yard or \$48,305.25; Item V, Mineral aggregate, 20768 tons at \$0.65 a ton or \$13,499.20; Item VI, Rock base—A. C. [11] La Rue, 81 Cubic yards at \$0.46 a cubic yard or \$37.26; Item VII Gravel Base 8" C.M.P. 75 cubic yards at \$0.46 a cubic yard, or \$34.50; Item VIII, Sand, 2374 tons at \$0.65 a ton or \$1543.10. That the total of the above items is \$76,230.73; that there is a balance due plaintiff on account of the difference in the amount paid out or expended by plaintiff from the date of the abandonment of said subcontract by said Duque & Frazzini on or about June 8, 1945, to the completion of said work by plaintiff, as aforesaid, in the sum of \$118,278.03, and the

amount earned in the sum of \$76,230.73, or the sum of \$42,047.30.

XIX.

That as shown by said statements herein alleged, after giving credit to said defendants for all amounts provided for under the terms of said subcontract hereto attached and marked Exhibit "A", in connection with the construction and completion of the work contracted to be done by said Duque & Frazzini, as aforesaid, there is now due, owing and unpaid from the defendants, and each of them, on account of the defendants' failure to fully perform the aforesaid subcontract work, the sum of \$78,503.71.

XX.

That plaintiff has done and fully performed each and every act on its part to be performed under the terms of the aforesaid subcontract, a copy of which is attached hereto as Exhibit "A", and under the terms of the aforesaid bond, a copy of which is attached hereto as Exhibit "B". That each and all of the amounts paid out by plaintiff as herein alleged and each and all of the charges therein made represent the fair and reasonable value of the labor, material, equipment and miscellaneous items furnished and provided by plaintiff, and each and all were necessary in order to perform and fulfill the terms and conditions of the aforesaid subcontract, a copy of which is attached hereto as [12] Exhibit "A".

XXI.

That by reason of the failure of the defendants to carry out and faithfully perform said subcontract in accordance with the terms thereof, plaintiff has suffered a loss as herein set forth in the total sum of \$78,503.71.

That the defendants, and each of them, though requested to pay said amount, have failed and refused to do so. That there is now due, owing and unpaid from defendants, and each of them, to plaintiff the sum of \$78,503.71, together with interest thereon at 7% per annum from the date of the respective payments and charges.

Wherefore, plaintiff prays that it have and receive judgment against said defendants, and each of them, in the sum of \$78,503.71, together with interest at seven per cent per annum upon each of the amounts so advanced and expended by plaintiff from the date of said respective advancements until paid. Plaintiff further prays the Court for its costs and for such other and further relief as to the court may seem meet and proper.

/s/ STEPHEN MONTELEONE,
Attorney for Plaintiff. [13]

State of California,
County of Los Angeles—ss.

N. L. Basich, being by me first duly sworn, deposes and says: that he is the President of Plaintiff corporation in the above entitled action; that he

has read the foregoing Complaint and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ N. L. BASICH.

Subscribed and sworn to before me this 26th day of December, 1945.

/s/ DOROTHY P. SOETH,

Notary Public in and for said County of Los Angeles, State of California.

My commission expires February 19, 1946. [14]

EXHIBIT A

Subcontract Agreement

This Agreement, made this 7th day of February, 1945, by and between Basich Brothers Construction Co., 600 S. Fremont Ave., Alhambra, California, party of the first part, hereinafter called the Contractor, and Duque & Frazzini, P.O. Box 75, Tonopah, Nevada, party of the second part, hereinafter called the Subcontractor, witnesseth: That

Whereas, the Contractor has heretofore entered into a Contract, hereinafter referred to as the original contract, dated January 25, 1945, with War Department, U. S. Engineer Office, 751 S. Figueroa St., Los Angeles, California, hereinafter called the Principal, for the Construction of Taxiways, warm-up and parking aprons, Job No. Davis-Monthan

ESA 210-6, 210-8, and 210-9, Davis-Monthan Field, Tucson, Arizona, Contract No. W-04-353-Eng.-1302, which contract includes the following described work to be done under this agreement:

Item 9 Gravel embankment, Item 11 Gravel for stabilized subgrade under gravel base course, Item 15 Gravel for base course, Item 21 Rock and sand for 18"-12"-18" Portland cement concrete airfield pavement, Item 22 Rock and sand for 10" Portland cement concrete airfield pavement, Item 26A Rock and sand for binder course asphaltic concrete, Class 1, Item 26B Rock and sand for wearing course asphaltic concrete, Class 2.

Now, Therefore, in consideration of the covenants and agreements hereinafter contained and payments to be made as hereinafter provided, the Contractor and the Subcontractor do hereby mutually agree as follows:

Article I. Performance of Work.

The Subcontractor shall furnish all materials, supplies and equipment, except as otherwise herein provided, and perform all labor required for the completion of the said work in accordance with all provisions of the original contract and of the specifications and plans referred to therein, all of which are hereby made a part of this agreement, and under the direction and to the satisfaction of the Principal's engineer or other authorized representative in charge of said work.

Article II. Commencement and Completion
of Work.

The work shall be commenced not later than February 19, 1945, and shall be completed on or before June 3, 1945.

Article III. Changes in the Original Contract.

It is mutually agreed and understood that the Contractor is not an insurer or guarantor of the said work or of any part thereof, or of the performance by the Principal of the original contract as specified therein or otherwise, and that the Subcontractor shall be bound by any changes or alterations made by the Principal in the said original contract, specifications or plans, or in the amount of character of said work or any part thereof, to the same extent that the Contractor is bound thereby.

Article IV. Liability of Subcontractor.

The Subcontractor shall hold and save the Contractor harmless from any liability for damage to the said work, or for injury or damage to persons or property occurring on or in connection therewith.

Article V. Warning Signals, Barricades, Etc.

The Subcontractor shall provide, erect and maintain proper warning signals, signs, lights, barricades and fences on and along the line of said work, and shall take all other necessary precautions for the protection of the work and safety of the public.

Article VI. Compensation and Public Liability Insurance.

The Subcontractor, shall at his own expense, provide workman's compensation insurance in accordance with the requirements of the original contract and of all Federal, State and/or municipal laws, ordinances and regulations relating thereto; also, insurance against liability for injury to persons and/or property occurring on or in connection with the work; Provided, that if the Subcontractor fails to provide such insurance, the Contractor is authorized to provide the same and to deduct the amounts of the premiums payable therefor from any moneys at any time due the Subcontractor under this agreement.

Article VII. Patents.

The Subcontractor shall hold and save the Contractor harmless from liability of any nature or kind for or on account of the use of any patented or unpatented invention, article, appliance or process furnished or used in or in connection with the performance of the said work.

Article VIII. Subletting and Assignment.

The work shall be performed by the Subcontractor with the assistance of workmen under his immediate superintendence, and shall not be sublet, assigned or other wise disposed of, either in whole or in part, except with the written consent of the Contractor.

Article IX. Other Subcontractors.

The Subcontractor shall cooperate fully with other subcontractors employed on the work, and shall so plan and conduct his work as not to interfere with their operations or with those of the Contractor. The Contractor will not be responsible for any delays or interference resulting from the acts or operations of other subcontractors.

Article X. Settlement of Controversies.

In the event any controversies should arise, the Contractor and the Subcontractor each will elect a representative, and the representative will in turn elect a third disinterested party to settle controversies. All decisions will be final.

Article XI. Payment for Labor and Supplies.

The Subcontractor shall promptly make payment to all persons supplying him with labor, materials and supplies for the prosecution of the work or in connection therewith. Any such payments not made by the Subcontractor when due may be made by the Contractor and the amounts thereof deducted from any moneys at any time due the Subcontractor under this agreement.

Article XII. Completion Work by Contractor.

If the Subcontractor shall fail to commence the work within the specified time, or to prosecute said work continuously with sufficient workmen and equipment to insure its completion the Contractor

within five (5) days will reserve the right to compel the Subcontractor to move in another plant. All cost in connection with moving in, moving out, erection, dismantling, operation, and any other cost in connection with operating and maintaining plant will be paid by the Subcontractor. In the event Basich Brothers Construction Co. plant is used, moving in and moving out expense will be paid by Basich [16] Brothers Construction Co.

Article XIII. Extension of Time.

No extension of the time herein specified for completion will be made in consideration of delays or suspensions of work due to the fault or negligence of the Subcontractor, and no extension will be granted that will render the Contractor liable for penalty or damages under the original contract.

Article XIV. Claims for Extra Work or Damages.

The Contractor will pay, for extra work performed and materials furnished by the Subcontractor under written authorization by the Principal's engineer, the actual cost thereof plus a percentage of said cost equal to one-half the percentage received by the Contractor, as and when he is paid therefor by the Principal.

Article XV. Basis and Scope of Payment.

Payment will be made to the Subcontractor for work actually performed and completed, as measured and certified to by the Principal's engineer, at the unit prices hereinafter specified, which prices shall be accepted by the Subcontractor as full com-

compensation for furnishing all material and for doing all work contemplated and embraced in this agreement; also all loss and damage arising out of the nature of the work aforesaid, and for all risks of every description connected with the said work; also for all expense incurred by the Subcontractor by or in consequence of the suspension or discontinuance of the work.

Article XVI. Partial Payment.

Partial payments for work performed under this agreement will be made by the Contractor on the basis of 90% of engineers estimate and 90% of useable materials in stockpile. In the event the Subcontractor is indebted to the Contractor for cash advances, supplies, materials, equipment, rental, labor, insurance on labor, or other proper charges against the work, the amount of such indebtedness may be deducted from any payment or payments made under this provision.

Article XVII. Final Payment.

Upon the completion of the Subcontractors contract, the Contractor will pay the remaining amount due him under this agreement within 30 days. All prior partial payments shall be subject to correction in the final payment; Provided, that if, on completion of the said work by the Subcontractor and prior to the completion of the original contract as a whole, the Subcontractor shall demand and receive full payment for his work according to the computations of the Principal's engineer, any

changes thereafter made in said computations shall not inure in whole or in part to the benefit or loss of the Subcontractor. Final payment as herein provided shall release the Contractor from any further obligation whatsoever in respect to this agreement.

Article XVIII. Failure to Enforce Provisions
Not a Waiver.

The failure of the Contractor to enforce at any time any of the provisions of this contract or to require at any time performance by the Subcontractor or any of the provisions hereof, shall in no way be construed to be a waiver, nor in any way to affect the validity of this agreement or any part thereof or the right of the Contractor to thereafter enforce each and every such provision.

Article XIX. Penalties.

It is understood that any fines, penalties, levies, assessments or charges for liquidated damages of any nature made by the Principal upon the Contractor for work done under this agreement will be charged to the Subcontractor. [17]

Article XX. Delays.

The Subcontractor shall have no claim for damages due to delays in delivery of material or failure of the Principal to provide Right of Way, plans, stakes, or delay from any cause whatsoever.

Article XXI. Special Provisions.

1. All materials to be taken from Mr. and Mrs. Collbs property.

2. Basich Brothers Construction Co. to pay for all royalties for materials. In the event Mr. and Mrs. Collbs material pit is exhausted, Basich Brothers Construction Co. will pay royalties for other material in the immediate vicinity.

3. Duque & Frazzini to submit weekly pay-rolls by Monday night of each week for the previous week which closes on Saturday at midnight to Basich Brothers Construction Co. Basich Brothers Construction Co. to pay labor, compensation, insurance, public liability, property damage, Arizona employment insurance, Federal Old Age, Excise Tax on Employers and any other insurance on labor and charge same to Duque & Frazzini, which amounts are to be deducted from amount earned.

4. Duque & Frazzini to pay Arizona Tax Commission for privilege of doing business in Arizona.

5. Duque & Frazzini to erect two plants, each to produce 800 c.y. of suitable material to be used in connection with the contract.

6. Duque & Frazzini to stockpile rock and sand for concrete pavement nearest to second party's plant. Same thing applies to rock and sand for asphalt concrete pavement.

7. Rock furnished for Items 21 and 22 shall be 3" (three-inch) maximum; prices furnished by Duque & Frazzini on these Items are predicated on the 3" maximum rock.

8. Permission is hereby granted to Duque & Frazzini to subcontract a portion of their contract to Vegas Rock & Sand Co., Las Vegas, Nevada.

Article XXI. (a) Renegotiation Pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942.

If this Subcontract is in excess of one hundred thousand dollars, (\$100,000.00), the Subcontractor agrees to renegotiate his contract prices pursuant to Section 403 of the Sixth Supplemental National Defense Appropriation Act, 1942, Public Law 528.

(a) At such period or periods when, in the judgment of the Secretary of War, the profits accruing to the contractor under this contract can be determined with reasonable certainty, the Secretary of War and the contractor, upon the written demand of the Secretary of War, will negotiate the contract price with a view to eliminating such profits as are found as a result of such renegotiation to be excessive.

(b) In the event that such renegotiation results in a reduction of the contract price, the amount of such reduction shall be retained by

the Government or repaid to the Government by the Contractor, as directed by the Secretary of War.

(c) Each fixed-price or lump sum subcontract in an amount in excess of \$100,000 entered into by the contractor hereunder shall include the following provisions: [18]

(1) At such period or periods when, in the judgment of the Secretary of War, the profits accruing to the Subcontractor under this contract can be determined with reasonable certainty, the Secretary of War and the Subcontractor, upon the written demand of the Secretary of War, will renegotiate the contract price with a view to eliminating such profits as are found as a result of such renegotiation to be excessive.

(2) In the event that such renegotiation results in a reduction of the contract price, the amount of such reduction shall, as directed by the Secretary of War,

(A) Be deducted by the Contractor from payments to the Subcontractor under this contract; or

(B) Be paid by the Subcontractor directly to the Government; or

(C) Be repaid by the Subcontractor to the Contractor.

(3) The Subcontractor agrees that the Contractor shall not be liable to the Subcontractor for or on account of any amount repaid to the Contractor or

paid to the Government by the Subcontractor or deducted by the Contractor from payments under this contract, pursuant to directions from the Secretary of War in accordance with the provisions of this Article. Under its contract with the Government, the Contractor is obligated to pay or credit to the Government all amounts repaid by or withheld from the Subcontractor hereunder.

(4) The term "Secretary of War" as used herein includes his duly authorized representatives.

(d) If any renegotiation between the Secretary of War and any Subcontractor pursuant to the provisions required by paragraph (c) hereof results in a reduction of the contract price of the subcontract, the Government shall retain from payments to the Contractor under this contract, or the Contractor shall repay to the Government, as the Secretary of War may direct, the amount of such reduction, less any amounts paid thereon by the Subcontractor directly to the Government.

(e) The term "Secretary of War" as used herein includes his duly authorized representatives.

Article XXII. Bond Provision.

Duque & Frazzini to furnish 100% Combination Bond (labor, material, and performance). Basich Brothers Construction Co. will pay for said bond.

Article XXIII. Schedule of Subcontract Unit
Prices with Approximate Quantities and
Amounts

Item	Approximate		Description	Approximate	
	Quantity	Unit		Price	Amount
9	15,300	c.y.	Gravel embankment, Gravel embankment shall be put in bin by second party and hauled away by first party. Any over - production that trucks cannot haul away shall be put in stockpile by second party and rehandled by first party. Engineers fill measurement to be used to govern quantities.	.46	7,038.00
11	9,000	c.y.	Gravel for stabilized sub-grade under gravel base course. Gravel shall be put in by second party and hauled away by first party. Any overproduction that trucks cannot haul away shall be put in stockpile by second party and rehandled by first party. Measurement to be computed on truck water level.	.40	3,600.00
15	42,530	c.y.	Gravel for base course. Gravel shall be put in bin by second party and hauled away by first party. Any overproduction that trucks cannot haul away shall be put in stockpile by second party and rehandled by first party. Engineers fill measurement to be used to govern quantities.	.46	

Item	Approximate		Description	Approximate	
	Quantity	Unit		Price	Amount
21	49,600	c.y.	Rock and sand for 18"—12" 18" Portland cement concrete airfield pavement. Rock and sand shall be put in stockpile by second party and rehandled by first party. Engineers measurement for concrete will be used to govern quantities.	1.05	
22	6,320	c.y.	Rock and sand for 10" Portland cement concrete airfield pavement. Rock and sand shall be put in stockpile by second party and rehandled by first party. Engineers measurement for concrete will be used to govern quantities.	1.05	
26A	8,535	tons	Rock and sand for binder course asphaltic concrete, Class 1.	.65	
26B	11,200	tons	Rock and sand for wearing course asphaltic concrete, Class 2. Rock and sand for Items 26A, and 26B, shall be put in stockpile by second party and rehandled by first party. Engineers weights for various classes of asphalt concrete will be used to govern quantities; however, oil used is to be removed first before tonnage computed.	.65	

Article XXIV. Damages for Delay in Completion.

If the Subcontractor shall fail to complete the said work within the time and in the manner specified, or within the time of such extensions as may be granted, he shall forfeit and pay to the Contractor the sum of the amount assessed by U. S. Engineer Office, per day for each calendar day that he is in default according to the terms hereof, which sum the Contractor shall retain as liquidated damages.

Article XXV.

It is mutually agreed that time is of the essence of this [20] agreement, and that it contains the whole and entire understanding of the parties hereto, and that it shall bind their heirs, executors, administrators, successors and assigns.

In Witness Whereof, the said parties have hereunto set their hands the day and year above written.

**BASICH BROTHERS
CONSTRUCTION CO.,**

By /s/ N. L. BASICH

Party of the First Part

DUQUE & FRAZZINI

By /s/ CARSON FRAZZINI

Party of the Second Part

EXHIBIT B

Glens Falls Indemnity Company
Of Glens Falls, New York

Sub-Contract Bond

Know All Men By These Presents, That we, Duque & Frazzini of Tonopah, Nevada, (hereinafter called the Principal) as Principal and Glens Falls Indemnity Company, of Glens Falls, New York (hereinafter called the Surety) as Surety, are held and firmly bound unto Basich Brothers Construction Co., 600 S. Fremont Ave., Alhambra, California, (hereinafter called the Obligee) in the sum of One Hundred One Thousand Seven Hundred Forty-five and 55/100 (\$101,745.55) Dollars, for the payment whereof said Principal and Surety bind themselves firmly by these presents.

Whereas, the Principal has entered into a written contract dated February 7th, 1945, with the Obligee for—

The construction of taxiways, warm-up and parking aprons, Job No. Davis-Monthan ESA 210-6, 210-8 and 210-9, Davis-Monthan Field, Tucson, Arizona, Contract No. W-04-353-Eng.-1302.

a copy of which is or may be hereto annexed.

Now, Therefore, The Condition Of This Obligation Is Such, that if the Principal shall faithfully perform the work contracted to be performed under said contract, and shall pay, or cause to be paid in full, the claims of all persons performing labor upon

or furnishing materials to be used in, or furnishing appliances, teams or power contributing to such work, then this obligation shall be void; otherwise to remain in full force and effect.

This bond is executed for the purpose of complying with the laws of the State of Arizona, and shall inure to the benefit of any and all persons who perform labor or furnish materials to be used in, or furnish appliances, teams or power contributing to the work described in said contract, so as to give such persons a right of action to recover upon this bond in any suit brought to foreclose the liens provided for by the laws of the State of Arizona, or in a separate suit brought on this bond. No right of action shall accrue hereunder to or for the use of any person other than the Obligee except as such right of action may be given by the Mechanics' Lien Laws of the State of Arizona to persons performing labor or furnishing materials, appliances, teams or power as aforesaid. The total amount of the surety's liability under this bond, both to the Obligee and to persons furnishing labor or material, appliances, teams or power, shall in no event exceed the penalty hereof.

The Principal and Surety further agree to pay all just labor claims arising under said contract, within two (2) weeks after demand, and to waive the filing of lien claims or giving written notice required by Statute as a condition to bringing suit to enforce the same.

Provided, however, as to said Obligee, and upon the Express Conditions, the performance of each of which shall be a condition precedent to any right of recovery hereon by said Obligee:

First: That in the event of any default on the part of the Principal, written notice thereof shall be delivered to the Surety, by registered mail at its office in the City of Los Angeles promptly, and in any event within ten (10) days after the owner, or his representative, or the architect, if any, shall learn of such default; that the Surety shall have the right, within thirty (30) days after receipt of such notice, to proceed or procure others to proceed with the performance of such contract; [22] shall also be subrogated to all the rights of the Principal; and any and all moneys or property that may at the time of such default be due, or that thereafter may become due to the Principal under said contract, shall be credited upon any claim which the Obligee may then or thereafter have against the Surety, and the surplus, if any, applied as the Surety may direct.

Second: That the Obligee shall faithfully perform all of the terms, covenants and conditions of such contract on the part of the Obligee to be performed; and shall retain the last payment payable by the terms of said contract, and all reserves and deferred payments retainable by the Obligee under the terms of said contract until the complete performance by the Principal of said contract, and until the expiration of the time within which notice

of claims or claims of liens by persons performing work or furnishing materials under said contract may be filed and until all such claims shall have been paid, unless the Surety shall consent, in writing, to the payment of said last payment, reserves or deferred payments.

Third: That the Surety shall not be liable for any damages resulting from strikes, or labor difficulties, or from mobs, riots, fire, the elements, or acts of God, or for the repair or reconstruction of any work or materials damaged or destroyed by any such causes, nor for damages from injury to, or the death of, any persons, nor for the non-performance of any guarantees of the efficiency or wearing qualities of any work done or materials furnished, or the maintenance thereof, or repairs thereto, nor for the furnishing of any bond or obligation other than this instrument.

Signed, sealed and dated this 20th day of February, 1945.

DUQUE & FRAZZINI,

By CARSON FRAZZINI,

[Corporate Seal]

GLENS FALLS INDEMNITY
COMPANY,

By /s/ HARRY LEONARD,
Attorney.

State of California,
County of Los Angeles—ss.

On this 20th day of February in the year One Thousand Nine Hundred and Forty-five, before me, Marwin F. Jonas, a Notary Public in and for said County of Los Angeles, residing therein, duly commissioned and sworn, personally appeared Harry Leonard, known to me to be the Attorney of the Glens Falls Indemnity Company, the Corporation that executed the said instrument on behalf of the Corporation therein named and acknowledge to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal in the County of Los Angeles the day and year in this certificate first above-written.

[Notarial Seal] MARWIN F. JONAS,
Notary Public in and for the County of,
State of California.

My commission expires Nov. 2, 1947.

[Endorsed]: Filed Dec. 27, 1945. [23]

[Title of District Court and Cause.]

BILL OF PARTICULARS

State of California,

County of Los Angeles—ss.

N. L. Basich, being first duly sworn, deposes and says: That he is the President of plaintiff corporation in the above-entitled action; that attached hereto, marked Schedules I to XXXXIV, inclusive, and made a part hereof, is an itemized statement set forth in particular constituting the items making the claim alleged in plaintiff's complaint on file herein; and that the same is true of his own knowledge. [24]

That said schedules are for the following items and amounts:

Schedule No.	Item	Amount	
		Charge	Credit
I	Payroll—		
	Duque & Frazzini	\$ 38,979.65	
II	Payroll—		
	Pioneer Crusher	8,240.54	
III	Payroll—		
	Pioneer Crusher	12,172.04	
IV	Payroll—		
	P. D. O. C. Crusher.....	3,250.01	
V	Payroll—		
	Hot Plant—Sand	2,888.92	
VI	Insurance	38,979.65	
VII	Equipment Rental—Fully Operated—Basich Brothers Construction Co.	3,989.41	

Schedule No.	Item	Amount	
		Charge	Credit
VIII	Equipment Rental — Not Fully Operated — Basich Brothers Construction Co.	\$2,773.86	
IX	Equipment Rental— Royalty Basis — Basich Brothers Construction Co.	4,191.60	
X	Equipment Rental—Fully Operated—P. D. O. C.....	6,902.37	
	Not Fully Operated.....	261.34	
XI	Equipment Rental—Fully Operated by Basich Brothers—J. J. North & Sons....	4,956.06	
XII	Equipment Rental—Fully Operated—B. B. Bonner....	625.74	
XIII	Equipment Rental — Not Fully Operated—Bressi & Bevanda	582.72	
XIV	Equipment Rental — Not Fully Operated—Industrial Equipment Co.	176.00	
XV	Equipment Rental—Fully Operated — Basich Brothers Construction Co.....	18,485.17	
XVI	Equipment Rental — Not Fully Operated — Basich Brothers Construction Co.	2,849.56	
XVII	Equipment Rental— Royalty Basis — Basich Brothers Construction Co.	6,753.20	
XVIII	Equipment Rental — Not Fully Operated — P. D. O. C.	108.50	
XIX	Equipment Rental—Fully Operated—P. D. O. C.....	10,412.57	

Schedule No.	Item	Amount	
		Charge	Credit
XX	Equipment Rental— Royalty Basis—P. D. O. C.	\$5,349.73	
XXI	Equipment Rental—Fully Operated—J. G. North & Sons	27,809.54	
XXII	Equipment Rental—Fully Operated—Phoenix Tempe Stone Co.	6,102.05	
XXIII	Equipment Rental — Not Fully Operated—Bressi & Bevanda	1,152.61	
XXIV	Equipment Rental — Not Fully Operated — Martin Construction Co.	270.00	
XXV	Equipment Rental — Not Fully Operated — Axman- Miller Construction Co.....	700.00	
XXVI	Repairs made by others on Basich Brothers Construc- tion Co. Equipment—Not Fully Operated	275.51	
XXVII	Parts purchased for Basich Brothers Construction Co. Equipment Not Fully Operated	2,257.88	
XXVIII	Parts Taken from Basich Brothers Construction Co. Stock	1,723.75	
XXIX	Fuel, Grease and Oil on Equipment Not Fully Operated	732.47	
XXX	Miscellaneous Labor, In- voices, Etc.	2,814.24	
XXXI	Freight on Rented Equip- ment	326.89	

Schedule No.	Item	Amount	
		Charge	Credit
XXXII	Repairs Made by Others on Basieh Brothers Con- struction Co. Equipment Not Fully Operated.....	\$3,969.97	
XXXIII	Parts Purchased for Basieh Brothers Construction Co. Equipment Not Fully Operated	3,215.19	
XXXIV	Parts Taken from Basieh Brothers Construction Co. Stock	1,028.91	
XXXV	Fuel, Grease and Oil on Equipment Not Fully Operated	1,371.50	
XXXVI	Miscellaneous Labor, In- voices, Etc.	4,803.15	
XXXVII	Freight on Rented Equip- ment	663.39	
XXXVIII	Production—Gravel Base..		\$ 25,191.44
XXXIX	Production — Gravel Sta- bilized Base		4,109.20
XXXX	Production — Gravel Em- bankment		4,719.60
XXXXI	Production—Concrete Ag- gregate		70,710.52
XXXXII	Production — Mineral Ag- gregate		15,377.93
XXXXIII	Production—Concrete Ag- gregate for Structures.....		405.30
XXXXIV	Miscellaneous Credits		1,319.96
		<hr/>	<hr/>
		\$201,124.04	\$121,833.95
Total Charges		\$201,124.04	
Total Credits		121,833.95	
		<hr/>	<hr/>
Balance Due		\$ 79,290.09	

/s/N. L. BASICH

Subscribed and sworn to before me this 1st day
of July, 1946.

[Seal] /s/ KAY TWOMBLEY

Notary Public in and for said
County and State.

My Commission expires: Feb. 13, 1950. [29]

SCHEDULE I

Payroll. Duque & Frazzini. 2/11/45 to 6/9/45.
\$38,979.65.

Employee: Brown, Jack. Occupation: Tractor Driver
Rate of Pay: Regular Time, \$1.50; Overtime, \$2.25

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	14	20.5	\$ 67.13
2/18-2/24/45	32	28	111.00
2/25-3/ 3/45		14	31.50
3/ 4-3/10/45	32	19	90.75
3/11-3/17/45	35	26	111.00
3/18-3/24/45	32	51	162.75
3/25-3/31/45	40	51	174.75
4/ 1-4/ 7/45	16	15	57.75
4/ 8-4/14/45	40	42	154.50
4/15-4/21/45	32	55	171.75
4/22-4/28/45	12	18.5	59.63
4/29-5/ 5/45	40	23	111.75
5/ 6-5/12/45	40	46.5	164.63
Total			<hr/> \$1,468.89

Employee: Cohen, Sidney. Occupation: Truck Driver

Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	16	12	\$ 34.00
2/18-2/24/45	16	8	28.00
3/18-3/24/45	16	5.5	24.25
Total			\$ 86.25

Employee: Greer, Clyde. Occupation: Laborer

Rate of Pay: Regular Time, \$.825; Overtime, \$1.2375

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	32	12.5	\$ 41.87
2/18-2/24/45	34	31	70.44
2/25-3/ 3/45	8	1	8.31
Total			\$ 120.62

Employee: Hurler, Ray. Occupation, Tractor Operator

Rate of Pay: Regular Time, \$1.50; Overtime, \$2.25

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	30.5	14	\$ 77.25
2/18-2/24/45	36	31	123.75
2/25-3/ 3/45	40	36	141.00
3/ 4-3/10/45	32	17.5	87.38
3/11-3/17/45	40	37	143.25
3/18-3/24/45	37.5	29	121.50
3/25-3/31/45	40	34	136.50
4/ 1-4/ 7/45	40	33	134.25
4/ 8-4/14/45		12	27.00
4/15-4/21/45	8	2.5	17.63
4/29-5/ 5/45	40	30	127.50
5/ 6-5/12/45	50	40	150.00
5/13-5/19/45	40	30	127.50
5/20-5/26/45	40	32.5	133.13
5/27-6/ 2/45	16	39.5	112.88
6/ 3-6/ 9/45	40	21	107.25
Total			\$1,767.77

Employee: Humez, Alex. Occupation: Laborer
 Rate of Pay: Regular Time, \$.825; Overtime, \$1.2375

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	32	13.5	\$ 43.11

Rate of Pay Changed to: Regular Time, \$.875; Overtime, \$1.3125

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	34	31	\$ 70.44
Total			\$ 113.55

Employee: McDaniel, Joe. Occupation: Laborer
 Rate of Pay: Regular Time, \$.825; Overtime, \$1.2375

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	16	11	\$ 26.81

Rate of Pay Changed to: Regular Time, \$.875; Overtime, \$1.3125

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	34	31	\$ 70.44
2/25-3/ 3/45	8	1	8.31
Total			\$ 105.56

Employee: Ryan, Earl. Occupation: Crusher Supt.
 Rate of Pay: Regular Time, \$600.00 per mo.

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	56		\$ 138.46
2/18-2/24/45	56		138.46
2/25-3/ 3/45	56		138.46
3/ 4-3/10/45	56		138.46
3/11-3/17/45	56		138.46
3/18-3/24/45	56		138.46
Total			\$ 830.76

Employee: Scott, Earl. Occupation: Truck Driver
 Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	40	18	\$ 67.00
2/18-2/24/45	40	27.5	81.25
2/25-3/ 3/45	24	8	36.00
3/ 4-3/10/45	34	11.5	51.25
3/11-3/17/45	8	2	11.00
3/18-3/24/45	25	24.5	61.75
3/25-3/31/45	32	31.5	79.25
4/ 1-4/ 7/45	40	29	83.50
4/ 8-4/14/45	24	17	49.50
6/ 3-6/ 9/45	40	16	64.00
Total			\$ 584.50

Employee: Stillwell, Hailey. Occupation: Laborer
 Rate of Pay: Regular Time, \$.825; Overtime, \$1.2375

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	29.5	11.5	\$ 38.57
Rate of Pay Changed to: Regular Time, \$.875; Overtime, \$1.3125			
Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	34	31	\$ 70.44
Total			\$ 109.01

Employee: Taylor, Paul. Occupation: Foreman
 Rate of Pay: Regular Time, \$1.75; Overtime, \$2.625

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45		9.5	\$ 24.94
2/18-2/24/45	40	34	159.25
2/25-3/ 3/45	40	34.5	160.56
3/ 4-3/10/45	32	28	129.50
3/11-3/17/45	40	31.5	152.69
3/18-3/24/45	36	24	126.00
3/25-3/31/45	8	2	19.25
Total			\$ 772.19

Employee: Allred, Vaughn P. Occupation: Truck Driver

Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-3/24/45	37	48	\$ 109.00
2/25-3/ 3/45	32	21	63.50
3/ 4-3/10/45	21	9	34.50
3/11-3/17/45	8	2	11.00
3/18-3/24/45	29	23	63.50
3/25-3/31/45	36	27	76.50
4/ 1-4/ 7/45	40	23	74.50
4/ 8-4/14/45	40	24	76.00
4/15-4/21/45	40	25.5	78.25
4/22-4/28/45	40	27	80.50
4/29-5/ 5/45	16	15	38.50
5/ 6-5/12/45	40	28.5	82.75
5/13-5/19/45	40	20.5	70.75
5/20-5/26/45	40	34.5	91.75
5/27-6/ 2/45	32	35.5	85.25
6/ 3-6/ 9/45	40	23	74.50
Total			\$1,110.75

Employee: Bogle, Farrow. Occupation: Carpenter

Rate of Pay: Regular Time, \$1.35; Overtime, \$2.025

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	40	33.5	\$ 121.84
2/25-3/ 3/45	34.5	25	97.21
3/ 4-3/10/45	32	21	85.73
3/11-3/17/45	32	17.5	78.64
Total			\$ 383.42

Employee: Hampton, Clarence. Occupation: Plant Foreman
 Rate of Pay: Regular Time, \$1.75; Overtime, \$2.625

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	38	21.5	\$ 122.94
2/25-3/ 3/45	36	30.5	143.06
3/ 4-3/10/45	32	30.5	136.06
3/11-3/17/45	32	17	100.63
3/18-3/24/45	37.5	33	152.26
3/25-3/31/45	40	54.5	213.06
4/ 1-4/ 7/45	40	44	185.50
4/ 8-4/14/45	40	45.5	189.44
4/15-4/21/45	40	45	188.13
4/22-4/28/45	40	46	190.75
4/29-5/ 5/45	40	53	209.13
5/ 6-5/12/45	40	50.5	202.56
5/13-5/19/45	40	41	177.63
5/20-5/26/45	40	51	203.88
5/27-6/ 2/45	32	55.5	201.69
6/ 3-6/ 9/45	40	31.5	152.69
Total			\$2,769.41

Employee: Hampton, Ernest. Occupation: Laborer
 Rate of Pay: Regular Time, \$.875; Overtime, \$1.3125

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45		8.5	\$ 11.16
2/25-3/ 3/45	33	13	45.94
3/ 4-3/10/45	32		28.00
3/11-3/17/45	16	14	32.38
3/18-3/24/45	36	27	66.94
3/25-3/31/45	40	28.5	72.41
4/ 1-4/ 7/45	40	28.5	72.41
4/ 8-4/14/45	40	28.5	72.41

Rate of Pay Changed to: Regular Time, \$.90; Overtime, \$1.35

Period	Hours Worked		Gross Wages
	Regular	Overtime	
4/15-4/21/45	10	10	22.50
Total			\$ 424.15

Employee: Hansen, Carl. Occupation: Oiler

Rate of Pay: Regular Time, \$.975; Overtime, \$1.4625

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	8	13	\$ 26.81
2/25-3/ 3/45	34	46.5	101.16
3/ 4-3/10/45	32	11.5	48.02
3/11-3/17/45	40	38	94.58
3/18-3/24/45	36	35.5	87.02
3/25-3/31/45	32	35.5	83.12
4/ 1-4/ 7/45	40	42.5	101.16
4/ 8-4/14/45	40	52	115.05
4/15-4/21/45	29	17	53.14
Total			\$ 710.06

Employee: Harvey, John. Occupation: Truck Driver

Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	17	8.5	\$ 29.75
2/25-3/ 3/45	34	12	52.00
3/ 4-3/10/45	34	.5	34.75
3/11-3/17/45	8	2	11.00
Total			\$ 127.50

Employee: Johnson, Joseph. Occupation: Timekeeper

Rate of Pay: Regular Time, \$300.00 per mo.

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	48.5		\$ 49.45
2/25-3/ 3/45	56		69.23
3/ 4-3/10/45	56		69.23
Total			\$ 187.91

Glens Falls Indemnity Co. vs.

Employee: Mariscal, Frank. Occupation: Laborer
 Rate of Pay: Regular Time, \$.875; Overtime, \$1.3125

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45		8.5	\$ 11.16
2/25-3/ 3/45	25	13	38.94
3/ 4-3/10/45	32	15	47.69
3/11-3/17/45	40	29	73.06
3/18-3/24/45	36	27	66.94
3/25-3/31/45	40	29	73.06

Occupation Change: Oiler

Rate of Pay Changed to: Regular Time, \$.975; Overtime, \$1.4625

Period	Hours Worked		Gross Wages
	Regular	Overtime	
4/ 1-4/ 7/45	40	33	\$ 87.26
4/ 8-4/14/45	40	34.5	89.46
4/15-4/21/45	34	22.5	66.06
4/22-4/28/45	32	24.5	67.03
4/29-5/ 5/45	40	40	97.50
5/ 6-5/12/45	40	29.5	115.84
5/13-5/19/45	40	46	149.88
5/20-5/26/45	40	26	108.63
5/27-6/ 2/45	24	40.5	116.53
6/ 3-6/ 9/45	40	27.5	111.72
Total			\$1,320.76

Employee: Sanders, Barney. Occupation: Truck Driver
 Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	24	11	\$ 40.50
2/25-3/ 3/45	34	12.5	52.75
Total			\$ 93.25

Employee: Talavera, Peliciano. Occupation: Laborer

Rate of Pay: Regular Time, \$.875; Overtime, \$1.3125

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45		8.5	\$ 11.16
2/25-3/ 3/45	33	13	45.94
3/ 4-3/10/45	32	10.5	41.78
3/11-3/17/45	16	9.5	26.47
3/18-3/24/45	28	14.5	43.53
3/25-3/31/45	36	28.5	68.91
4/ 1-4/ 7/45	40	30	74.38

Rate of Pay Changed to: Regular Time, \$.90; Overtime, \$1.35

Period	Hours Worked		Gross Wages
	Regular	Overtime	
4/ 8-4/14/45	40	33	\$ 80.55
4/15-4/21/45	34	21.5	59.63
4/22-4/28/45	32	21	57.15
4/29-5/ 5/45	16	18	38.70
5/ 6-5/12/45	40	29	75.15
5/13-5/19/45	32	29	67.95
5/20-5/26/45	40	31.5	78.53
5/27-6/ 2/45	32	39.5	82.13
6/ 3-6/ 9/45	40	17.5	59.63
Total			\$ 911.59

Employee: Van Valkenburg, Edward. Occupation, Laborer

Rate of Pay: Regular Time, \$.875; Overtime, \$1.3125

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45		8.5	\$ 11.16
2/25-3/ 3/45	33	13	45.94
3/ 4-3/10/45	32		28.00
3/11-3/17/45	16	14	32.38
3/18-3/24/45	36	27	66.94
3/25-3/31/45	40	29	73.06
4/ 1-4/ 7/45	40	28.5	72.41

Rate of Pay Changed to: Regular Time, \$.90; Overtime, \$1.35

Period	Hours Worked		Gross Wages
	Regular	Overtime	
4/ 8-4/14/45	40	28.5	74.48
4/15-4/21/45	24	12.5	38.48
4/22-4/28/45	40	30.5	77.18
4/29-5/ 5/45	40	30.5	77.18
5/ 6-5/12/45	40	27	72.45
5/13-5/19/45	24	16.5	43.88
Total			\$ 713.54

Employee: Tomany, Don. Occupation: Truck Driver

Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	40	98	\$ 187.00
2/25-3/ 3/45	40	29	83.50
3/ 4-3/10/45	24	17	49.50
5/11-5/17/45	28	11	44.50
3/18-3/24/45	40	35.5	93.25
3/25-3/31/45	40	38	97.00
4/ 8-4/14/45	40	65	137.50
4/15-4/21/45	24	40.5	84.75
4/22-4/28/45	40	39.5	99.25
4/29-5/ 5/45	40	35	92.50
5/ 6-5/12/45	24	11	40.50
Total			\$1,009.25

Employee: Smith, Jim. Occupation: Truck Driver

Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/18-2/24/45	8	16	\$ 32.00
Total			\$ 32.00

Employee: Burchfield, Clyde. Occupation: Crusher Operator
 Rate of Pay: Regular Time, \$1.375; Overtime, \$2.0625

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/25-3/ 3/45	10	13	\$ 40.56
3/ 4-3/10/45	32	12	68.75
3/11-3/17/45	24	31.5	97.97
3/18-3/24/45	34	35	118.94
3/25-3/31/45	40	55	168.44

Occupation Changed to: Crusher Foreman

Rate of Pay Changed to: Regular Time, \$1.75; Overtime, \$2.625

Period	Hours Worked		Gross Wages
	Regular	Overtime	
4/ 1-4/ 7/45	40	42.5	\$ 181.56
4/ 8-4/14/45	40	52.5	207.81
4/15-4/21/45	32	38.5	157.06
4/22-4/28/45	40	30.5	150.06
4/29-5/ 5/45	40	51	203.88
5/ 6-5/12/45	16	13	62.13

Occupation Changed Back to: Crusher Operator

Rate of Pay Changed Back to: Regular Time, \$1.375;
 Overtime, \$2.0625

Period	Hours Worked		Gross Wages
	Regular	Overtime	
5/20-5/26/45	16	5	\$ 32.31
Total			\$1,489.47

Employee: Gorby, Clifford. Occupation: Oiler

Rate of Pay: Regular Time, \$.975; Overtime, \$1.4625

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/25-3/ 3/45	34.5	17	\$ 58.50
3/ 4-3/10/45	10		9.75
3/18-3/24/45	31	18.5	57.29
3/25-3/31/45	8	5	15.11
Total			\$ 140.65

Glens Falls Indemnity Co. vs.

Employee: Scott, Dallas. Occupation: Tractor Operator

Rate of Pay: Regular Time, \$1.50; Overtime, \$2.25

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/25-3/ 3/45	32	19	\$ 90.75
3/ 4-3/10/45	40	33.5	135.38
3/11-3/17/45	30.5	24.5	100.88
3/18-3/24/45	29.5	37	127.50
3/25-3/31/45	31	41	138.75
4/ 1-4/ 7/45	32	41	140.25
4/ 8-4/14/45	40	26	118.50
4/15-4/21/45	40	29	125.25
Total			\$ 977.26

Employee: Shrader, Jim. Occupation: Truck Driver

Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/25-3/ 3/45	40	76	\$ 154.00
Total			\$ 154.00

Employee: Rutherford, Arthur. Occupation: Tractor Operator

Rate of Pay: Regular Time, \$1.50; Overtime, \$2.25

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/25-3/ 3/45	20	13	\$ 59.25
Total			\$ 59.25

Employee: Schellhase, Frank. Occupation: Truck Driver

Rate of Pay: Regular, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/25-3/ 3/45	4.5		\$ 4.50
Total			\$ 4.50

Employee: Serventi, Lucien A., Jr. Occupation: Truck Driver

Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
3/ 4-3/10/45	24	.5	\$ 24.75
Total			\$ 24.75

Employee: Mosley, Thamor O. Occupation: Shovel Operator

Rate of Pay: Regular Time, \$1.625; Overtime, \$2.4375

Period	Hours Worked		Gross Wages
	Regular	Overtime	
3/11-3/17/45	40		\$ 65.00
3/18-3/24/45	36.5	22.5	113.93
3/25-3/31/45	40	22.5	119.84
4/ 1-4/ 7/45	36	33	138.94
4/ 8-4/14/45	40	34.5	149.09
4/15-4/21/45	34	22.5	110.09
4/22-4/28/45	40	35.5	151.53
4/29-5/ 5/45	40	38.5	158.84
5/ 6-5/12/45	32	31.5	128.78
5/13-5/19/45	40	34	147.88
5/20-5/26/45	40	22.5	119.84
5/27-6/ 2/45	32	41	153.16
6/ 3-6/ 9/45	40	21	116.19
Total			\$1,673.11

Glens Falls Indemnity Co. vs.

Employee: Wailes, Stacey. Occupation: Oiler
 Rate of Pay: Regular, \$.975; Overtime, \$1.4625

Period	Hours Worked		Gross Wages
	Regular	Overtime	
3/11-3/17/45	32		\$ 31.20
3/18-3/24/45	36.5	26	73.62
3/28-3/31/45	40	22.5	71.91
4/ 1-4/ 7/45	40	33	87.26
4/ 8-4/14/45	32	34	80.93
4/15-4/21/45	40	24	74.10
4/22-4/28/45	32	29.5	74.34
4/29-5/ 5/45	40	38	94.58
5/ 6-5/12/45	32	31.5	77.27
5/13-5/19/45	40	34	88.73
5/20-5/26/45	32	20.5	61.18
5/27-6/ 2/45	32	39.5	88.97
6/ 3-6/ 9/45	40	21	69.71
Total			\$ 973.80

Employee: Paco, Raymond. Occupation: Laborer
 Rate of Pay: Regular, \$.875; Overtime, \$1.3125

Period	Hours Worked		Gross Wages
	Regular	Overtime	
3/11-3/17/45	32	15	\$ 47.69
3/18-3/24/45	24	25	53.81
3/25-3/31/45	28	23	54.69
Total			\$ 156.19

Employee Acosta, Antonia A. Occupation: Laborer
 Rate of Pay: Regular, \$.875; Overtime, \$1.3125

Period	Hours Worked		Gross Wages
	Regular	Overtime	
3/18-3/24/45	20	3	\$ 21.44
Total			\$ 21.44

Employee: Collins, Charles. Occupation, Truck Driver

Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
3/18-3/24/45	17.5	9	\$ 31.00
3/25-3/31/45	28	18.5	55.75
4/ 1-4/ 7/45	36	14.5	57.75
4/ 8-4/14/45	16	17	41.50
4/15-4/21/45	34	21	65.50
4/22-4/28/45	16	13.5	36.25
4/29-5/ 5/45	36	35.5	89.25
5/ 6-5/12/45	36	24	72.00
5/13-5/19/45	36	12	54.00
5/20-5/26/45	40	18	67.00
5/27-6/ 2/45	24	34	75.00
6/ 3-6/ 9/45	40	12	58.00
Total			\$ 703.00

Employee: Cosillo, Jose A. Occupation: Laborer

Rate of Pay: Regular Time, \$.875; Overtime, \$1.3125

Period	Hours Worked		Gross Wages
	Regular	Overtime	
3/18-3/24/45	11.5		\$ 10.06
3/25-3/31/45	36	26.5	66.28
4/ 1-4/ 7/45	40	29	73.06
4/ 8-4/14/45	40	28.5	72.41

Rate of Pay Changed to: Regular Time, \$.90; Overtime, \$1.35

Period	Hours Worked		Gross Wages
	Regular	Overtime	
4/15-4/21/45	30	13	\$ 44.55
4/22-4/28/45	40	31	77.85
4/29-5/ 5/45	40	33.5	81.23
5/ 6-5/12/45	24	16	43.20
Total			\$ 468.64

Glens Falls Indemnity Co. vs.

Employee: Collins, Earl. Occupation: Truck Driver

Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
3/18-3/24/45	22	10	\$ 37.00
3/25-3/31/45	28	18.5	55.75
4/ 1-4/ 7/45	36	26.5	75.75
4/ 8-4/14/45	24	17.5	50.25
4/15-4/21/45	34	21.5	66.25
4/22-4/28/45	24	23.5	59.25
4/29-5/ 5/45	40	34.5	91.75
5/ 6-5/12/45	36	24	72.00
5/13-5/19/45	28	20	58.00
5/20-5/26/45	40	18	67.00
5/27-6/ 2/45	32	30	77.00
6/ 3-6/ 9/45	40	18	67.00
Total			\$ 777.00

Employee: Gatlin, Cecil L. Occupation: Truck Driver

Rate of Pay: Regular Time, \$1.00; Overtime, \$1.50

Period	Hours Worked		Gross Wages
	Regular	Overtime	
3/18-3/24/45	22	10	\$ 37.00
3/25-3/31/45	28	18.5	55.75
4/ 1-4/ 7/45	36	26.5	75.75
4/ 8-4/14/45	24	17.5	50.25
4/15-4/21/45	18		18.00
4/29-5/ 5/45	16	12.5	34.75
5/ 6-5/12/45	24	14	45.00
5/13-5/19/45	40	16.5	64.75
5/20-5/26/45	40	18	67.00
5/27-6/ 2/45	32	14	53.00
6/ 3-6/ 9/45	40	18	67.00
Total			\$ 568.25

Employee: McDaniel, Leslie. Occupation, Tractor Operator
Rate of Pay: Regular Time, \$1.50; Overtime, \$2.25

Period	Hours Worked		Gross Wages
	Regular	Overtime	
2/11-2/17/45	4		\$ 6.00
2/18-2/24/45	4		6.00
Total			\$ 12.00

*[Written Notation]: Eliminate.

Labor Borrowed from Basich Brothers

Employee: McCoy, Rex. Occupation: Maintainer Operator
Rate of Pay: Regular Time, \$1.50; Overtime, \$2.25

Period	Hours Worked		Wages Gross
	Regular	Overtime	
2/18-2/24/45	22.5		\$ 33.75
Total			\$ 33.75

*[Written Notation]: Eliminate.

Labor Borrowed from Basich Brothers

SCHEDULE II

Payroll. Pioneer Crusher. 3/25/45 to 6/9/45.
\$8,240.54.

SCHEDULE III

Payroll. Pioneer Crusher. 6/9/45 to 9/22/45.
\$12,172.04.

SCHEDULE IV

Payroll. P. D. O. C. Crusher. 6/3/45 to 7/7/45.
\$3,250.01.

SCHEDULE V

Payroll. Hot Plant—Sand. 6/9/45 to 9/22/45.
\$2,888.92.

SCHEDULE VI

Insurance 2/17/45 to 9/22/45, \$7,958.00

Labor and Insurance**

Week Ending	Labor	Insurance
2/17/45	\$ 565.14*	\$ 59.29
2/24/45	1,727.15*	176.77
3/ 3/45	1,770.87*	183.14
3/10/45	1,339.23*	141.47
3/17/45	1,403.78*	151.10
3/24/45	1,956.68*	205.30
3/31/45	2,514.00*	270.95
4/ 7/45	3,132.91*	348.03
4/14/45	3,704.83*	413.71
4/21/45	3,130.53*	345.77
4/28/45	3,016.26*	332.35
5/ 5/45	4,522.19	545.44
5/12/45	4,563.10	549.55
5/19/45	3,603.47	438.89
5/26/45	3,523.02	415.55
6/ 2/45	3,564.49	421.78
6/ 9/45	3,517.01	421.04
6/16/45	2,648.23	334.05
6/23/45	2,732.51	341.64
6/30/45	2,473.40	319.11
7/ 7/45	2,027.95	279.65
7/14/45	1,420.86	182.41
7/21/45	1,447.18	184.63
7/28/45	1,358.39	172.00
8/ 4/45	1,431.46	175.58
8/11/45	958.00	124.59
8/18/45	102.54	11.16
8/25/45	1,000.64	135.72
9/ 1/45	885.39	112.36
9/ 8/45	667.09	83.49

Week Ending	Labor	Insurance
9/15/45	\$ 187.89	\$ 24.65
9/22/45	433.87	56.47
Totals	\$67,330.06	\$7,958.00

*Differential in 5506 and 1710 rate in
Comp. Ins. 1,258.51
\$9,216.51

**Insurance includes Compensation, Public Liability, Property Damage, California Unemployment, Federal Old Age and Federal Excise.

SCHEDULE VII

Equipment Rental. Fully Operated. Basich Brothers Construction Co., 2/12/45 to 5/19/45, \$3,989.41

Rental of Equipment by
Basich Brothers Construction Company Fully Operated
Owner of Equipment—Basich Brothers Construction Co.

Date	Description	Total Hours	Rate	Amount
2/12	D8 Dozer	4	9.375	\$37.50
2/19	Tractor W/PCU	4	8.45	33.80
2/20	Tractor W/PCU	6.5	8.45	54.93
2/21	Tractor W/PCU	8	8.45	67.60
2/22	D8 Tractor W/PCU....	8	8.45	67.60
2/26	Truck Semi No. 44.....	5	7.00	35.00
2/28	Welding Truck	8	6.85	54.80
	Welding Truck .....	.5	8.225	4.11
	D8 Dozer	6	8.45	50.70
	Semi-Truck No. 43.....	4	6.00	24.00
3/5	N.W. 80 Shovel.....	5	18.22	91.10
3/6	N.W. 80 Shovel.....	6	18.22	109.32
3/7	Welding Truck	8	6.85	54.80
	Welding Truck	2	8.225	16.45
3/8	N.W. 80 Shovel.....	8	18.22	145.76

Date	Description	Total Hours	Rate	Amount
3/9	N.W. 80 Shovel.....	8	18.22	\$145.76
	N.W. 80 Shovel.....	2	20.34	40.68
3/11	Welding Truck	10.5	8.225	86.36
	N.W. 80 Shovel.....	8.5	20.34	172.89
	D8 Dozer	10	10.20	102.00
3/14	Maintainer	1	6.50	6.50
3/15	Welding Truck	8	6.85	54.80
3/16	Welding Truck	2	6.85	13.70
3/17	Welding Truck	7	8.225	57.58
3/19	Welding Truck	8	6.85	54.80
	Welding Truck	4	8.225	32.90
3/20	Welding Truck	8	6.85	54.80
3/20	Welding Truck	2.5	8.225	20.56
3/21	Welding Truck	4	6.85	27.40
3/27	Welding Truck	7	6.85	47.95
3/28	Welding Truck	6	6.85	41.10
3/29	Dozer 342	8	9.375	75.00
	Dozer 342	2	10.20	20.40
3/30	Dozer 342	8	9.375	75.00
	Dozer 342	2	10.20	20.40
3/31	Dozer 342	10	10.20	102.00
4/ 1	Dozer 342	10	10.20	102.00
4/ 2	Dozer 342	8	9.375	75.00
	Dozer 342	3	10.20	30.60
4/ 3	Dozer 342	8	9.375	75.00
	Dozer 342	8.5	10.20	86.70
4/ 4	Dozer 342	8	9.375	75.00
	Dozer 342	2	10.20	20.40
4/ 5	Dozer 342	8	9.375	75.00
	Dozer 342	2	10.20	20.40
4/ 6	Dozer 342	8	9.375	75.00
	Dozer 342	2	10.20	20.40
4/ 7	Dozer 342	13	10.20	132.60
4/ 9	Dozer 342	8	9.375	75.00
	Dozer 342	2	10.20	20.40
4/10	Dozer 342	8	9.375	75.00
	Dozer 342	2	10.20	20.40
	Truck Crane	5	12.50	62.50
4/11	Dozer 342	8	9.375	75.00
	Dozer 342	3.5	10.20	35.70
4/12	Dozer 342	8	9.375	75.00
	Dozer 342	3	10.20	30.60

Date	Description	Total Hours	Rate	Amount
4/12	N.W. 6 Shovel.....	4	11.725	\$46.90
4/13	Dozer 342	6	9.375	56.25
4/14	Dozer 342	5	10.20	51.00
4/18	N.W. 6 Shovel.....	4	11.725	46.90
4/19	Dozer 342	8	9.375	75.00
4/19	Dozer 342	4	10.20	40.80
4/20	Dozer 342	8	9.375	75.00
	Dozer 342	2.5	10.20	25.50
4/21	Dozer 342	10	10.20	102.00
5/15	Truck Crane	1	12.50	12.50
5/17	Truck Crane	2.5	12.50	31.25
5/18	Truck Crane	1.5	12.50	18.75
5/19	Truck Crane	2.5	14.05	35.13
	Dozer 322 .....	.5	10.20	5.10
	Tournapull .....	.5	11.825	5.91
	Maintainer .....	.5	7.33	3.67
Total				\$3,989.41

SCHEDULE VIII

Equipment Rental. Not Fully Operated. Basich
Brothers Construction Co., 3/29/45 to 6/9/45,
\$2,773.86

Rental of Equipment by Basich Brothers Construction
Company Not Fully Operated

Owner of Equipment—Basich Brothers Construction Company

Description	From	To	Rate	Amount
Symons Screen 3x10	3/29/45	6/9/45	175.00	\$414.13
Electric Motor	3/29/45	6/9/45	15.00	35.50
Conveyor 22" x 65'.....	3/29/45	6/9/45	65.00	153.87
Symons Screen	4/ 4/45	6/9/45	175.00	379.15
Symons Screen	4/ 6/45	6/9/45	175.00	367.49
Electric Motor	4/ 4/45	6/9/45	15.00	32.50
Electric Motor	4/ 6/45	6/9/45	15.00	31.50
Conveyor 30"	4/ 4/45	6/9/45	65.00	140.85
D-17000 Generator	3/29/45	6/9/45	445.00	1,053.13
Bunker	3/29/45	6/9/45	35.00	82.87
Bunker	3/29/45	6/9/45	35.00	82.87
Total				\$2,773.86

SCHEDULE IX

Equipment Rental. Royalty Basis. Basich Brothers
Construction Co., \$4,191.60

Rental of Equipment on Royalty Basis

Owner of Equipment—Basich Brothers Construction Company

Description	Quantity	Rate	Amount
Pioneer Crusher (Rock Base)	7,102 cu. yds.	\$0.10	\$ 710.00
Pioneer Crusher (Min. Aggr.)	6,071 tons	0.10	607.10
Pioneer Crusher (Cone. Aggr.)	27,750 cu. yds.	0.10	2,775.00
Hot Plant (Sand)	995 tons	0.10	99.50
Total			\$4,191.60

SCHEDULE X

Equipment Rental. Fully Operated. P. D. O. C.,
2/12/45 to 5/19/45, \$6,902.37. Not Fully Oper-
ated, 5/9/45 to 6/10/45, \$261.34

Rental of Equipment by Basich Brothers Construction Company
From Others for Duque & Frazzini

Owner of Equipment—P. D. O. C.—Rented Fully Operated

Date	Description	Total Hours	Rate	Amount
2/12/45	Tournacraane	5	10.00	\$50.00
2/19/45	R. U. Carryall	4	6.025	24.10
2/20/45	R. U. Carryall	6.5	6.025	39.16
2/21/45	R. U. Carryall	8	6.025	48.20
2/22/45	R. U. Carryall	8	6.025	48.20
2/26/45	Tournacraane	5	10.00	50.00
3/ 8/45	Dozer 501	8	9.375	75.00
3/14/45	Dozer 501	2.5	9.375	23.44
3/15/45	Dozer 501	8	9.375	75.00
3/16/45	Dozer 501	5	9.375	46.88
3/17/45	Dozer 501	9.5	10.20	96.90
3/18/45	Dozer 501	4.5	10.20	45.90
3/19/45	Dozer 501	2	9.375	18.75
3/20/45	Dozer 501	5	9.375	46.88
3/21/45	Dozer 501	1	9.375	9.38

Basich Brothers Construction Co.

63

Date	Description	Total Hours	Rate	Amount
3/24/45	Dozer 426	2	10.20	\$20.40
3/28/45	Dozer 426	1.5	9.375	14.06
3/29/45	Dozer 426	1.5	9.375	14.06
3/30/45	Dozer 426	1.5	9.375	14.06
4/ 5/45	Dozer 428	8	9.375	{ 75.00
4/ 5/45	Dozer 428	4.5	10.20	{ 45.90
4/ 8/45	Dozer 502	5	10.20	51.00
4/ 9/45	Dozer 502	8	9.375	75.00
4/ 9/45	Dozer 502	2	10.20	20.40
4/11/45	Dozer 502	8	9.375	75.00
4/11/45	Dozer 502	3.5	10.20	35.70
4/12/45	Dozer 502	8	9.375	75.00
4/12/45	Dozer 502	7	10.20	71.40
4/13/45	Dozer 428	8	9.375	75.00
4/13/45	Dozer 428	3.5	10.20	35.70
4/13/45	Shovel 510	4.5	12.38	55.71
4/13/45	Dozer 502	8	9.375	75.00
4/13/45	Dozer 502	5	10.20	51.00
4/14/45	Dozer 502	7	10.20	71.40
4/14/45	Dozer 428	10.5	10.20	107.10
4/15/45	Dozer 502	10	10.20	102.00
4/16/45	Dozer 502	8	9.375	75.00
4/16/45	Dozer 502	4	10.20	40.80
4/17/45	Dozer 502	8	9.375	75.00
4/17/45	Dozer 502	1	10.20	10.20
4/18/45	Dozer 428	8	9.375	75.00
4/18/45	Dozer 428	2.5	10.20	25.50
4/18/45	Dozer 502	4.5	9.375	42.19
4/19/45	Dozer 428	5	9.375	46.88
4/19/45	Dozer 502	8	9.375	75.00
4/19/45	Dozer 502	4	10.20	40.80
4/20/45	Dozer 502	8	9.375	75.00
4/20/45	Dozer 502	3	10.20	30.60
4/20/45	Dozer 428	5	9.375	46.88
4/21/45	Dozer 428	5	10.20	51.00
4/21/45	Dozer 502	12	10.20	122.40
4/22/45	Dozer 502	11	10.20	112.20
4/22/45	Dozer 428	5	10.20	51.00
4/23/45	Dozer 502	8	9.375	75.00
4/23/45	Dozer 502	4.5	10.20	45.90

[Written Notation—Bracketed] \$104.50. LRY, J.

Date	Description	Total Hours	Rate	Amount
4/23/45	Dozer 428	5	9.375	\$46.88
4/24/45	Dozer 502	8	9.375	75.00
4/24/45	Dozer 502 .....	.5	10.20	5.10
4/24/45	Dozer 428	4	9.375	37.50
4/25/45	Dozer 428	4	9.375	37.50
4/25/45	Dozer 322	8	9.375	75.00
4/25/45	Dozer 322	2	10.20	20.40
4/25/45	Dozer 502	8	9.375	75.00
4/26/45	Dozer 322	8	9.375	75.00
4/26/45	Dozer 322	2.5	10.20	25.50
4/26/45	Dozer 428	8	9.375	75.00
4/26/45	Dozer 428	3.5	10.20	35.70
4/26/45	Dozer 502	8	9.375	75.00
4/27/45	Dozer 322	8	9.375	75.00
4/27/45	Dozer 322	3.5	10.20	35.70
4/27/45	Dozer 428	3	9.375	28.13
4/27/45	Dozer 592	8	9.375	75.00
4/27/45	Dozer 592	6	10.20	61.20
4/28/45	Dozer 322	10	10.20	102.00
4/28/45	Dozer 428	3	10.20	30.60
4/28/45	Dozer 502	10	10.20	102.00
4/29/45	Dozer 502	10.5	10.20	107.10
4/29/45	Dozer 428	3	10.20	30.60
4/29/45	Dozer 322	9.5	10.20	96.90
4/30/45	Dozer 428	3	9.375	28.13
4/30/45	Dozer 502	8	9.375	75.00
5/ 1/45	Dozer 428	3	9.375	28.13
4/30/45	Dozer 502	2.5	10.20	25.50
5/ 1/45	Dozer 322	8	9.375	75.00
5/ 1/45	Dozer 322	2.5	10.20	25.50
5/ 2/45	Dozer 428	4	9.375	37.50
5/ 2/45	Dozer 322	8	9.375	75.00
5/ 2/45	Dozer 322	2.5	10.20	25.50
5/ 3/45	Dozer 322	8	9.375	75.00
5/ 3/45	Dozer 322	2.5	10.20	25.50
5/ 3/45	Dozer 428	3	9.375	28.13
5/ 4/45	Dozer 428	6	9.375	56.25
5/ 4/45	Dozer 322	8	9.375	75.00
5/ 4/45	Dozer 322	4	10.20	40.80
5/ 5/45	Dozer 322	4	10.20	40.80
5/ 6/45	Dozer 428	4	10.20	40.80

Date	Description	Total Hours	Rate	Amount
5/ 6/45	Dozer 322	12	10.20	\$122.40
5/ 7/45	Dozer 428	4	9.375	37.50
6/ 7/45	Dozer 322	8	9.375	75.00
5/ 7/45	Dozer 322	4.5	10.20	45.90
5/ 8/45	Dozer 428	8	9.375	75.00
5/ 8/45	Dozer 428	5	10.20	51.00
5/ 8/45	Dozer 322	2	9.375	18.75
5/ 9/45	Dozer 428	8	9.375	75.00
5/ 9/45	Dozer 428	4	10.20	40.80
5/ 9/45	Dozer 322	2.5	9.375	23.44
5/10/45	Dozer 428	8	9.375	75.00
5/10/45	Dozer 428	4.5	10.20	45.90
5/10/45	Dozer 322	2	9.375	18.75
5/11/45	Dozer 428	8	9.375	75.00
5/11/45	Dozer 428	4	10.20	40.80
5/11/45	Dozer 322	2	9.375	18.75
5/12/45	Dozer 428	8.5	10.20	86.70
5/13/45	Dozer 428	13	10.20	132.60
5/14/45	Dozer 428	8	9.375	75.00
5/14/45	Dozer 428	2.5	10.20	25.50
5/15/45	Dozer 428	8	9.375	75.00
5/15/45	Dozer 428	2.5	10.20	25.50
5/16/45	Dozer 322	8	9.375	75.00
5/16/45	Dozer 322	2.5	10.20	25.50
5/16/45	Dozer 428	8	9.375	75.00
5/16/45	Dozer 428	4	10.20	40.80
5/17/45	Dozer 428	8	9.375	75.00
5/17/45	Dozer 428	4.5	10.20	45.90
5/18/45	Dozer 428	8	9.375	75.00
5/18/45	Dozer 428	3	10.20	30.60
5/19/45	Dozer 428	4.5	10.20	45.90
Total				\$6,902.37

Equipment Rented Not Fully Operated

Description	From	To	Rate	Amount
D-13000 Power Unit.....	5/9/45	6/10/45	245.00	\$261.34

SCHEDULE XI

Equipment Rental. Fully Operated by Basich
Brothers, J. J. North & Sons. 2/21/45 to 6/6/45,
\$4,956.06

Rental of Equipment by Basich Brothers Construction Co.
From Others for Duque & Frazzini
Fully Operated by Basich Brothers
Owner of Equipment—J. J. North & Sons

Date	Description	Total Hours	Rate	Amount
2/21/45	North 5 yd. Dump....	5	4.13	\$20.65
2/22/45	5 yd. Dump.....	3.5	4.13	14.46
2/23/45	5 yd. Dump.....	6	4.13	24.78
2/24/45	5 yd. Dump.....	6.5	4.13	26.85
2/26/45	5 yd. Dump.....	6.5	4.13	26.85
2/27/45	5 yd. Dump.....	8.5	4.13	35.11
2/28/45	5 yd. Dump.....	8.5	4.13	35.11
3/ 1/45	5 yd. Dump.....	1	4.13	4.13
3/ 2/45	5 yd. Dump.....	8.5	4.13	35.11
3/ 3/45	5 yd. Dump.....	9	4.13	37.17
3/26/45	Winch Truck	5.5	3.00	16.50
3/29/45	5 yd. Dump.....	40	4.13	165.20
3/30/45	5 yd. Dump.....	78.5	4.13	324.21
3/31/45	5 yd. Dump.....	76.5	4.13	315.95
4/ 1/45	5 yd. Dump.....	94.5	4.13	390.29
4/ 2/45	5 yd. Dump.....	55	4.13	227.15
4/ 3/45	5 yd. Dump.....	18.5	4.13	76.41
4/ 4/45	5 yd. Dump.....	71	4.13	293.23
4/ 5/45	5 yd. Dump.....	32.5	4.13	134.23
4/ 6/45	5 yd. Dump.....	72	4.13	297.36
4/ 7/45	5 yd. Dump.....	80.5	4.13	332.47
4/ 9/45	5 yd. Dump.....	38.5	4.13	159.01
4/10/45	5 yd. Dump.....	17.5	4.13	72.28
4/11/45	5 yd. Dump.....	28.5	4.13	117.71
4/13/45	5 yd. Dump.....	3.5	4.13	14.46
4/14/45	5 yd. Dump.....	5.5	4.13	22.72
4/16/45	6 yd. Dump.....	1	4.40	4.40
4/17/45	5 yd. Dump.....	20	4.13	82.60
	Winch Truck	2	3.00	6.00
4/18/45	5 yd. Trucks	40	4.13	165.20
4/19/45	5 yd. Trucks	31.5	4.13	88.80

Date	Description	Total Hours	Rate	Amount
4/20/45	5 yd. Trucks	27	4.13	\$111.51
	Winch Truck	2	3.00	6.00
4/21/45	6 yd. Truck.....	10	4.40	44.00
	5 yd. Truck.....	28.5	4.13	117.71
4/22/45	5 yd. Truck.....	.5	4.13	2.07
4/23/45	6 yd. Truck.....	9	4.40	39.60
	5 yd. Truck.....	23	4.13	94.99
4/24/45	5 yd. Truck.....	2	4.13	8.26
4/25/45	5 yd. Truck.....	7.5	4.13	30.98
4/26/45	5 yd. Truck.....	3.5	4.13	14.46
	Winch Truck	8	3.00	24.00
4/27/45	5 yd. Dumps.....	24.5	4.13	101.19
	6 yd. Dumps.....	8	4.40	35.20
	Winch Truck	1.5	3.00	4.50
4/28/45	5 yd. Dumps.....	37	4.13	152.81
	6 yd. Dumps.....	12	4.40	52.80
4/29/45	5 yd. Dumps.....	35	4.13	144.55
	6 yd. Dumps.....	12	4.40	52.80
4/30/45	Winch Truck	2	3.00	6.00
	5 yd. Dumps.....	12	4.13	49.56
	6 yd. Dumps.....	12	4.40	52.80
5/ 1/45	5 yd. Dumps.....	10	4.13	41.30
	6 yd. Dumps.....	11.5	4.40	50.60
5/ 2/45	5 yd. Dumps.....	3	4.13	12.39
5/ 2/45	Winch Truck	3	3.00	9.00
5/ 3/45	5 yd. Trucks.....	3	4.13	12.39
5/ 4/45	5 yd. Trucks.....	2	4.13	8.26
5/ 7/45	Winch Truck	2.5	3.00	7.50
5/ 8/45	5 yd. Dumps.....	1	4.13	4.13
5/11/45	5 yd. Dumps.....	4	4.13	16.52
5/14/45	Winch Truck	1.5	3.00	4.50
5/18/45	Winch Truck	2	3.00	6.00
5/19/45	5 yd. Trucks.....	6	4.13	24.78
5/20/45	Winch Truck	10	3.00	30.00
5/22/45	Winch Truck	2.5	3.00	7.50
5/25/45	Winch Truck	1.5	3.00	4.50
6/ 6/45	Winch Truck	1.5	3.00	4.50
Total				<hr/> \$4,956.06

SCHEDULE XII

Equipment Rental. Fully Operated. B. B. Bonner,
4/6/45 to 4/24/45, \$625.74

Rental of Equipment by Basich Brothers Construction Company
From Others for Duque & Frazzini

Owner of Equipment: B. B. Bonner—Rented Fully Operated

Date	Description	Total Hours	Rate	Amount
5/ 6/45	D-7 Dozer	2	7.575	\$15.15
4/ 9/45	D-7 Dozer	1	7.575	7.58
4/10/45	D-7 Dozer	8	7.575	60.60
4/10/45	D-7 Dozer	2	8.40	16.80
4/11/45	D-7 Dozer	8	7.575	60.60
4/11/45	D-7 Dozer	1	8.40	8.40
4/12/45	D-7 Dozer	3	7.575	22.73
4/13/45	D-7 Dozer	8	7.575	60.60
4/14/45	D-7 Dozer	10	8.40	84.00
4/16/45	D-7 Dozer	8	7.575	60.60
4/16/45	D-7 Dozer	3.5	8.40	29.40
4/17/45	D-7 Dozer	2.5	7.575	18.94
4/22/45	D-7 Dozer	12	8.40	100.80
4/23/45	D-7 Dozer	8	7.575	60.60
4/24/45	D-7 Dozer	2.5	7.575	18.94
Total				\$ 625.74

SCHEDULE XIII

Equipment Rental. Not Fully Operated. Bressi
& Bevanda. 4/24/45 to 6/9/45, \$582.72

Rental of Equipment by Basich Brothers Construction Company
From Others for Duque & Frazzini

Owner of Equipment—Bressi & Bevanda
Rented Not Fully Operated

Description	From	To	Rate	Amount
D-13000 with Generator....	4/24/45	6/9/45	380.00	\$582.72

SCHEDULE XIV

Equipment Rental. Not Fully Operated. Industrial
Equipment Co., 4/6/45 to 5/8/45, \$176.00

Rental of Equipment by Basich Brothers Construction Company
From Others for Duque & Frazzini

Owner of Equipment—Industrial Equipment Co.
Rented Not Fully Operated

Description	From	To	Rate	Amount
McCormick-Deering Power Unit	4/6/45	5/8/45	165.00	\$176.00

SCHEDULE XV

Equipment Rental. Fully Operated. Basich Brothers
Construction Co., 6/9/45 to 9/16/45,
\$18,485.17

SCHEDULE XVI

Basich Brothers Construction. Equipment Rental.
Not Fully Operated. 6/9/45 to 9/8/45, \$2,849.56

SCHEDULE XVII

Basich Brother Construction Co. Equipment
Rental. Royalty Basis, \$6,753.20

Rental of Equipment by Basich Brothers Construction Company
on Royalty Basis

Description	Tonnage	Rate	Amount
Pioneer Crusher (Base).....	6036	0.10	\$603.60
Pioneer Crusher (Min. Aggr.).....	19,283	0.10	1,928.30
Pioneer Crusher (Conc. Aggr.).....	39,990	0.10	3,999.00
Hot Plant (Sand)	2,223	0.10	222.30
Total			\$6,753.20

SCHEDULE XVIII

Equipment Rental. Not Fully Operated. P. D. O. C.,
6/15/45 to 9/17/45, \$108.50

SCHEDULE XIX

Equipment Rental. Fully Operated. P. D. O. C.,
6/9/45 to 9/6/45, \$10,412.57

SCHEDULE XX

Equipment Rental. Royalty Basis.
P. D. O. C., \$5,349.73

Rental of Equipment by Basich Brothers Construction Company
From Others for Duque & Frazzini

Owner of Equipment: P. D. O. C.—Royalty Basis

Description	Tonnage	Rate	Amount
P.D.O.C. Pioneer Crusher.....	23602 tons	0.17	\$5,349.73
	(31469) loose		

SCHEDULE XXI

Equipment Rental. Fully Operated. J. G. North
& Sons. 6/8/45 to 9/12/45, \$27,809.54

SCHEDULE XXII

Equipment Rental. Fully Operated. Phoenix Tempe
Stone Co. 6/15/45 to 8/9/45, \$6,102.05

SCHEDULE XXIII

Equipment Rental. Not Fully Operated. Bressi
& Bevanda. 6/9/45 to 9/10/45, \$1152.61

SCHEDULE XXIV

Equipment Rental. Not Fully Operated. Martin
Construction Co. 6/15/45 to 9/8/45, \$270.00

SCHEDULE XXV

Equipment Rental. Not Fully Operated. Axman-
Miller Construction Co. 7/6/45 to 9/17/45, \$700.00

SCHEDULE XXVI

Repairs Made by Others on Basich Brothers Con-
struction Co. Equipment. Not Fully Operated,
\$275.51

SCHEDULE XXVII

Parts Purchased for Basich Brothers Construction
Co. Equipment. Not Fully Operated. 2/14/45
to 6/4/45, \$2,257.88

Parts Purchased for Basich Brothers Construction Co.
Equipment Not Fully Operated

Invoice Date	Company	Invoice No.	Amount
2/14/45	Abbey Scherer Co.....	F-89	\$ 82.13
3/ 1/45	Abbey Scherer Co.	F-123	193.37
3/ 2/45	Symons Brothers Screen Co.	S-7419	160.72
3/ 8/45	Abbey Scherer Co.....	F-137	31.09
3/24/45	Abbey Scherer Co.....	F-176	176.45
3/31/45	Abbey Scherer Co.....	F-190	115.80
4/ 2/45	Abbey Scherer Co.....	F-194	62.10
4/ 2/45	Victor Belting & Rubber Co.	6594	4.83
4/ 6/45	Abbey Scherer Co.....	F-202	174.67
4/10/45	F. Ronstadt	A15095	10.44
4/13/45	Symons Brothers Screen Co.	S7502	37.67
4/13/45	Symons Brothers Screen Co.	S7503	80.36

Invoice Date	Company	Invoice No.	Amount
4/13/45	Symons Brothers Screen Co.	S7503	\$ 34.44
4/30/45	Symons Brothers Screen Co.	S7539	139.14
5/ 4/45	Harron Rickard & McCone..	50098	16.16
5/12/45	Harron Rickard & McCone..	50117	174.59
5/ 7/45	Brown-Bevis Equipment Co.	74543	398.42
4/21/45	Abbey Scherer Co.....	F-245	34.09
4/30/45	Abbey Scherer Co.....	F-267	121.89
6/ 7/45	Abbey Scherer Co.....	F-379	57.90
6/ 4/45	Victor Belting & Rubber Co.	8029	151.62
Total			\$2,257.88

SCHEDULE XXVIII

Parts Taken From Basich Brothers
Construction Co. Stock, \$1,723.75

SCHEDULE XXIX

Fuel, Grease and Oil on Equipment Not
Fully Operated. 4/9/45 to 5/31/45, \$732.47

SCHEDULE XXX

Miscellaneous Labor, Invoices, Etc.
2/26/45 to 6/16/45, \$2,814.24

Miscellaneous Labor, Invoices, Etc.

Date	Description	Labor	Invoice Amount	Ins. on Labor
2/26/45	Move & Set up Pioneer	33.69		
2/28/45	" " " " "	41.60		
3/ 1/45	" " " " "	21.80		
3/ 2/45	" " " " "	29.60		
3/ 3/45	" " " " "	46.71		
3/ 4/45	" " " " "	46.71		
3/ 5/45	" " " " "	14.80		

Date	Description	Labor	Invoice Amount	Ins. on Labor
3/ 6/45	Move & Set Up Pioneer	45.80		
3/ 7/45	“ “ “ “ “	52.55		
3/ 8/45	“ “ “ “ “	39.60		
3/ 9/45	“ “ “ “ “	80.65		
3/10/45	“ “ “ “ “	115.73		
3/11/45	“ “ “ “ “	142.20		
3/12/45	“ “ “ “ “	106.31		
3/13/45	“ “ “ “ “	98.44		
3/14/45	“ “ “ “ “	88.84		
3/15/45	“ “ “ “ “	91.46		
3/16/45	“ “ “ “ “	91.46		
3/17/45	“ “ “ “ “	74.64		
3/18/45	“ “ “ “ “	77.27		
3/19/45	“ “ “ “ “	78.93		
3/20/45	“ “ “ “ “	72.97		
3/21/45	“ “ “ “ “	64.82		
3/22/45	“ “ “ “ “	46.64		
3/27/45	“ “ “ “ “	92.84		
3/28/45	“ “ “ “ “	113.82		
3/29/45	North Drivers Overtime	4.00		
3/30/45	“ “ Show up	2.00		
	“ “ Overtime	7.25		
3/31/45	“ “ “	39.02		
4/ 1/45	“ “ “	47.25		
4/ 3/45	“ “ Downtime	9.50		
4/ 4/45	“ “ “	3.00		
	“ “ Overtime	7.00		
4/ 6/45	“ “ “	5.25		
4/ 7/45	“ “ “	40.25		
	“ “ Downtime	.50		
4/ 9/45	“ “ “	1.00		
	“ “ Overtime	1.25		
4/10/45	“ “ “	.25		
	“ “ Downtime	5.50		
4/11/45	“ “ “	1.50		
	“ “ Overtime	3.50		
4/14/45	“ “ “	2.75		
4/18/45	“ “ Show up	6.00		
	“ “ Overtime	4.00		
4/19/45	“ “ “	3.00		

Date	Description	Labor	Invoice Amount	Ins. on Labor
4/20/45	North Drivers Overtime	1.50		
4/21/45	“ “ “	20.00		
	“ “ Downtime	1.50		
4/22/45	“ “ Overtime	.25		
4/23/45	“ “ “	1.50		
4/24/45	“ “ Show up	6.00		
4/25/45	“ “ “	6.00		
	“ “ Downtime	2.00		
	“ “ Overtime	.25		
4/27/45	“ “ “	.25		
4/28/45	“ “ “	26.50		
	“ “ Downtime	4.00		
4/29/45	“ “ “	3.50		
4/29/45	“ “ Overtime	23.50		
4/30/45	“ “ “	4.00		
4/30/45	Tucson Mac. E. Eng.....		121.88	
6/13/45	H. S. Thompson Exp. Acc't.		49.69	
6/16/45	H. S. Thompson Exp. Acc't.		235.53	
	Phone Charges		92.30	
	10% Insurance on labor			210.44
Totals		\$2,104.40	\$499.40	\$210.44
Grand Total				\$2,814.24

SCHEDULE XXXI

Freight on Rented Equipment, \$326.89

SCHEDULE XXXII

Repairs Made by Others on Basich Brothers Construction Co. Equipment. Not Fully Operated.

6/9/45 to 9/10/45, \$3,969.97

SCHEDULE XXXIII

Parts Purchased for Basich Brothers Construction Co. Equipment. Not Fully Operated. 6/16/45 to 9/18/45, \$3,215.19

SCHEDULE XXXIV

Parts Taken From Basich Brothers Construction Company Stock, \$1,028.91

SCHEDULE XXXV

Fuel, Grease and Oil on Equipment Not Fully Operated. 6/7/45 to 9/6/45, \$1,371.50

SCHEDULE XXXVI

Miscellaneous Labor, Invoices, Etc.
6/7/45 to 9/17/45, \$4,803.15

Miscellaneous Labor, Invoices, Etc.

Date	Description	Labor	Invoice Amount	Ins. on Labor
6/ 7/45	Move & Set up P.D.O.C. Plant		2,500.00	
6/ 9/45	North Drivers Overtime	17.00		
6/10/45	“ “ Overtime	43.75		
	“ “ Downtime	40.00		
6/11/45	“ “ Overtime	10.00		
	“ “ Downtime	11.00		
6/12/45	“ “ Overtime	14.00		
	“ “ Downtime	14.50		
6/13/45	“ “ Overtime	13.25		
	“ “ Downtime	13.50		
6/14/45	“ “ Overtime	24.75		
	“ “ Downtime	10.00		
6/15/45	“ “ Overtime	7.25		
	“ “ Downtime	21.50		

Date	Description	Labor	Invoice Amount	Ins. on Labor
6/16/45	North Drivers Overtime	77.50		
6/17/45	“ “ “	29.50		
6/18/45	“ “ “	17.75		
	“ “ Downtime	26.00		
6/19/45	“ “ Overtime	21.75		
	“ “ Downtime	16.00		
6/20/45	“ “ Overtime	21.00		
	“ “ Downtime	8.00		
6/21/45	“ “ Overtime	22.25		
	“ “ Downtime	20.00		
6/22/45	“ “ Overtime	23.00		
	“ “ Downtime	4.50		
6/23/45	“ “ Overtime	77.75		
	“ “ Downtime	7.50		
6/24/45	“ “ Overtime	93.75		
	“ “ Downtime	5.50		
6/25/45	“ “ Overtime	20.75		
	“ “ Downtime	4.50		
6/26/45	“ “ Overtime	10.00		
	“ “ Downtime	6.00		
6/27/45	“ “ Overtime	12.75		
	“ “ Downtime	9.00		
6/28/45	“ “ Overtime	11.75		
	“ “ Downtime	1.00		
6/29/45	“ “ Overtime	11.00		
	“ “ Downtime	2.50		
6/30/45	“ “ Overtime	66.25		
	“ “ Downtime	33.50		
7/ 1/45	“ “ Overtime	46.00		
	“ “ Downtime	11.50		
7/ 2/45	“ “ Overtime	14.00		
	“ “ Downtime	33.00		
7/ 3/45	“ “ Overtime	13.50		
	“ “ Downtime	27.50		
7/ 4/45	“ “ Overtime	65.00		
7/ 5/45	“ “ “	8.50		
	“ “ Downtime	36.00		
7/ 6/45	“ “ Overtime	9.00		
7/ 7/45	“ “ “	35.75		

Date	Description		Labor	Invoice Amount	Ins. on Labor
	North Drivers	Downtime	11.00		
7/ 8/45	"	" Overtime	45.00		
	"	" Downtime	4.50		
7/ 9/45	"	" Overtime	9.00		
	"	" Downtime	1.00		
7/10/45	"	" Overtime	3.00		
	"	" Downtime	4.00		
7/11/45	"	" Overtime	11.00		
7/12/45	"	" Downtime	35.50		
7/13/45	"	" "	13.00		
7/14/45	"	" Overtime	42.00		
	"	" Downtime	24.00		
7/15/45	"	" Overtime	43.75		
	"	" Downtime	4.00		
7/16/45	"	" Overtime	14.00		
7/17/45	"	" "	12.00		
	"	" Downtime	4.00		
7/18/45	"	" "	25.00		
	"	" "	15.00		
7/19/45	"	" Overtime	13.50		
	"	" Downtime	12.00		
7/20/45	"	" Overtime	8.25		
	"	" Downtime	13.50		
7/21/45	"	" Overtime	52.00		
	"	" Downtime	5.00		
7/23/45	"	" Overtime	9.25		
	"	" Downtime	10.50		
7/24/45	"	" "	10.00		
7/25/45	"	" Overtime	10.00		
	"	" Downtime	41.50		
7/26/45	"	" Overtime	10.00		
7/27/45	"	" "	10.00		
	"	" Downtime	25.00		
7/28/45	"	" Overtime	15.00		
7/30/45	"	" Downtime	8.50		
8/ 2/45	"	" Overtime	9.00		
8/ 3/45	"	" "	7.00		
8/ 4/45	"	" "	34.75		
8/ 5/45	"	" "	40.50		
8/ 6/45	"	" "	7.75		
	"	" Downtime	12.00		

Date	Description	Labor	Invoice Amount	Ins. on Labor
8/ 7/45	North Drivers Overtime	7.75		
8/ 8/45	“ “ “	7.75		
	“ “ Downtime	8.00		
8/ 9/45	“ “ Overtime	6.00		
	“ “ Downtime	6.00		
8/18/45	“ “ Overtime	13.50		
8/22/45	“ “ Downtime	3.00		
8/23/45	“ “ “	20.50		
8/25/45	“ “ Overtime	40.75		
	“ “ Downtime	5.50		
8/26/45	“ “ Overtime	35.00		
	“ “ Downtime	3.50		
8/27/45	“ “ Overtime	5.75		
	“ “ Downtime	3.50		
8/28/45	“ “ “	3.50		
8/29/45	“ “ Overtime	10.25		
8/30/45	“ “ Downtime	8.00		
	“ “ Overtime	8.25		
9/ 4/45	“ “ Downtime	7.00		
	“ “ Overtime	6.75		
9/ 6/45	“ “ “	4.75		
9/12/45	“ “ “	2.00		
9/17/45	Load Axman-Miller Screen		17.00	
	Ins. on Labor			
	2103.75 @ 8.67 per hun.			182.40
	Total	\$2,103.75	\$2,517.00	\$182.40
	Grand Total.....			\$4,803.15

SCHEDULE XXXVII

Freight on Rented Equipment, \$663.39

SCHEDULE XXXVIII

Production. Gravel Base, \$25,191.44

Production—Item 15

Gravel Base

Contract Price—\$0.46 c.y.

Estimate Date	Quantity	Credit
3/31/45	6,307 c.y.	\$2,901.22
4/15/45	11,662 c.y.	5,364.52
4/30/45	3,595 c.y.	1,653.70
5/15/45	11,140 c.y.	5,124.40
5/31/45	5,703 c.y.	2,623.38
6/ 8/45	533 c.y.	245.18
6/15/45	567 c.y.	214.82
6/15- 6/30/45	2,986 c.y.	1,373.56
7/ 1- 7/15/45	774 c.y.	356.04
7/16- 7/31/45		
8/ 1- 8/15/45		
6/15- 7/31 (Extension)	7,500 c.y.	3,450.00
8/ 1- 8/15/45		
8/16- 8/31/45	3,046 c.y.	1,401.16
8/ 1- 8/10/45 (Extension)	75 c.y.	34.50
8/31-10/ 8/45	976 c.y.	448.96
	<hr/>	<hr/>
	54,764 c.y.	\$25,191.44

SCHEDULE XXXIX

Production. Gravel Stabilized Base, \$4,109.20

Production—Item 11

Gravel Stabilized Base Contract Price—\$0.40 c.y.

Estimate Date	Quantity	Credit
3/31/45	34,700 s.y.	
4/15/45	15,840 s.y.	
4/30/45	9,561 s.y.	
5/15/45	33,256 s.y.	
5/31/45	20,448 s.y.	
6/ 8/45	33,903 s.y.	
6/15- 6/30/45		
7/ 1- 7/15/45		
7/16- 7/31/45		
8/ 1- 8/15/45		
8/16- 8/31/45	3,792 s.y.	
8/31-10/ 8/45	2,602 s.y.	
	<hr/>	
	154,102 s.y.	
	or	
	10,273 c.y.	\$4,109.20

SCHEDULE XXXX

Production. Gravel Embankment, \$4,719.60

Production—Item 9

Gravel Embankment

Contract Price—0.46 c.y.

Estimate Date	Quantity	Credit
3/31/45		
4/15/45	500 c.y.	\$ 230.00
4/30/45	500 c.y.	230.00
5/15/45	2,000 c.y.	920.00
5/31/45		
6/ 8/45		
6/15/45		

Estimate Date	Quantity	Credit
6/15- 6/30/45	1,900 c.y.	\$ 874.00
7/ 1- 7/15/45		
7/16- 7/31/45		
8/ 1- 8/15/45	595 c.y.	273.70
8/16- 8/31/45	3,566 c.y.	1,640.36
8/31-10/ 8/45	1,199 c.y.	551.54
	<hr/>	<hr/>
	10,260 c.y.	\$4,719.60

SCHEDULE XXXXI

Production. Concrete Aggregate, \$70,710.52

Production—Items 21 & 22

Concrete Aggregate

Contract Price—\$1.05 c.y.

Estimate Date	Quantity	Credit
3/31/45		
4/15/45	2,630 c.y.	\$ 2,761.50
4/30/45	8,150 c.y.	8,557.50
5/15/45	2,600 c.y.	2,730.00
5/31/45	8,355.21 c.y.	8,772.97
6/ 8/45	5,189.22 c.y.	5,448.68
6/15/45	4,540.57 c.y.	4,767.60
6/15- 6/30/45	5,115 c.y.	5,370.75
7/ 1- 7/ 5/45	3,353 c.y.	3,520.65
7/16- 7/31/45		
8/ 1- 8/15/45	4,828 c.y.	5,069.40
6/15- 7/31		
(Extension)	10,015.20 c.y.	10,515.96
8/ 1- 8/15/45	2,255 c.y.	2,367.75
8/16- 8/31/45	2,949 c.y.	3,096.45
8/ 1- 8/10/45		
(Extension)	1,102.15	1,157.26
8/31-10/ 8/45	6,261 c.y.	6,574.05
	<hr/>	<hr/>
Total	67,343.35 c.y.	\$70,710.52

SCHEDULE XXXXII

Production. Mineral Aggregate, \$15,377.93

Production—Items 26A & 26B

Mineral Aggregate

Contract Price—\$0.65 Ton

Estimate Date	Quantity	Credit
3/31/45		
4/15/45		
4/30/45		
5/15/45	4,827 tons	\$ 3,137.55
5/31/45		
6/ 8/45		
6/15/45		
6/15- 6/30/45		
7/ 1- 7/15/45	5,731 tons	3,725.15
7/16- 7/31/45		
8/ 1- 8/15/45	9,112 tons	5,922.80
8/16- 8/31/45		
8/31-10/ 8/45	5,233.16	3,401.55
	<hr/>	<hr/>
	24,903.16 tons	16,187.05
Minus oil	1,244.81	Minus oil 809.12
	<hr/>	<hr/>
Total	23,658.35 tons	\$15,377.93

SCHEDULE XXXXIII

Production. Concrete Aggregate for
Structures, \$405.30

Production—Concrete Aggregate for Structures

Contract Price—\$1.05 c.y.

Estimate Date	Quantity	Credit
3/31/45		
4/15/45		
4/30/45		
5/15/45	20 c.y.	\$21.00

Estimate Date	Quantity	Credit
5/31/45	95 c.y.	\$99.75
6/ 8/45		
6/15/45		
6/15- 6/30/45	8.5 c.y.	8.92
7/ 1- 7/15/45	74.5 c.y.	78.23
7/16- 7/31/45		
6/15- 7/31/45 (Extension)	6 c.y.	6.30
8/ 1- 8/15/45	122 c.y.	128.10
8/16- 8/31/45	20 c.y.	21.00
8/31-10/ 8/45	40 c.y.	42.00
Total	386 c.y.	\$405.30

SCHEDULE XXXXIV

Miscellaneous Credits, \$1,319.96

Miscellaneous Credits

Item	Quantity	Rate	Credit
Sand for Seal Coat.....	751 tons	\$0.65 ton	\$488.15
Gravel Base Sold to A. C. LaRue Construction Co. for Strips Adjacent to Hanger	390 c.y.	0.46 c.y.	179.40
Gravel Base for 8" CMP.....	75 c.y.	0.46 c.y.	34.50
Credit—Maintainer Rental.....			525.00
Credit—Labor			92.91
Total Credit			\$1,319.96

Received copy of the within this day of....
19.....

J. E. McCALL,

By JOSEPH J. BURRIS,

Attorney for Glens Falls
Indemnity Company.

[Endorsed]: Filed July 1, 1946.

[Title of District Court and Cause.]

NOTICE TO PRODUCE

To Basich Brothers Construction Company, a Corporation, Plaintiff, and to Stephen Monteleone, Esq., Plaintiff's Attorney:

You Are Hereby Notified and Required to produce at the pre-trial and also at the trial of the above-entitled cause, the following documents, to wit:

1. Employer's copy of all withholding returns with copies of withholding receipts attached to any of said returns, which were filed with the Internal Revenue Department covering employees [373] working on the alleged subcontract work of Duque & Frazzini;

2. Employer's copy of all Arizona State Employment insurance returns covering employees working on the alleged subcontract work of Duque & Frazzini;

3. Employer's copy of all returns made under the Federal Insurance Contributions Act (Social Security) covering employees working on the alleged subcontract work of Duque & Frazzini;

4. Policy of Insurance covering public liability and property damage on the alleged subcontract work of Duque & Frazzini;

5. Policy of Workmen's Compensation Insurance covering employees working on the alleged subcontract work of Duque & Frazzini;

6. Subcontract bond bearing date the 20th day of February, 1945, in which Duque & Frazzini are named as Principal, Glens Falls Indemnity Company is named as Surety and Basich Brothers Construction Co. is named as Obligee and letter bearing date March 7, 1945 addressed to Basich Bros. Construction Co., 600 So. Fremont Ave., Alhambra, Calif. from Glens Falls Indemnity Company, By Marwin F. Jonas, Attorney;

7. Daily record of all material produced by Duque & Frazzini between February 19, 1945 and June 8, 1945 inclusive, on the alleged subcontract work of Duque & Frazzini; [374]

8. Letter bearing date May 19, 1945 addressed to Basich Brothers Construction Co., Tucson, Arizona, by Duque and Frazzini, By A. Duque;

9. Letter bearing date June 7, 1945 addressed to Basich Brothers Construction Company, c/o Stephen Monteleone, Attorney, 714 West Olympic Boulevard, Los Angeles 15, California, by J. E. McCall;

10. Letter bearing date June 23, 1945 addressed to Basich Brothers Construction Company, c/o Mr. Stephen Monteleone, Attorney, 714 West Olympic Boulevard, Los Angeles 15, California, by J. E. McCall.

and you are further notified that in case of your failure to produce any of said documents, defendant

Glens Falls Indemnity Company, a corporation will offer secondary evidence of its contents.

Dated this 25th day of June, 1946.

/s/ JOHN E. McCALL,
Attorney for Defendant Glens Falls Indemnity
Company, a corporataion. [375]

Received copy of the within Notice to Produce
this 27th day of June, 1946.

/s/ STEPHEN MONTELEONE,
Attorney for Plaintiff.

[Endorsed]: Filed June 28, 1946.

[Title of District Court and Cause.]

REQUEST FOR ADMISSION UNDER
RULE 36

Defendant Glens Falls Indemnity Company requests plaintiff Basich Brothers Construction Company to make the following admissions for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial, to-wit:

That each of the following statements is true:

1. Basich Brothers Construction Company, a corporation, plaintiff herein, is named as employer in all withholding returns and withholding receipts which were filed with the Internal Revenue Depart-

ment covering employees working on the alleged subcontract [377] work of Duque & Frazzini.

2. Basich Brothers Construction Company, a corporation, plaintiff herein, is named as employer in all Arizona State Employment Insurance returns covering employees working on the alleged subcontract work of Duque & Frazzini.

3. Basich Brothers Construction Company, a corporation, plaintiff herein, is named as employer in all Social Security returns made under the Federal Insurance Contributions Act, covering employees working on the alleged subcontract work of Duque & Frazzini.

4. Basich Brother Construction Company, a corporation, plaintiff herein, is named as insured in all policies of insurance covering public liability and property damage on the alleged subcontract work of Duque & Frazzini.

5. Basich Brothers Construction Company, a corporation, plaintiff herein, is named as employer in all Workmen's Compensation Insurance policies covering employees working on the alleged subcontract work of Duque & Frazzini.

6. All wages and salaries of all employees performing labor or services on the alleged subcontract between the plaintiff herein and Duque & Frazzini, dated February 7, 1945, were paid by the plaintiff

Basich Brother Construction Company, a corporation.

Dated July 8, 1946.

/s/ JOHN E. McCALL,
Attorney for Defendant Glens Falls Indemnity
Company, a corporation.

Received copy of the within request for admission
under Rule 36 this 8th day of July, 1946.

STEPHEN MONTELEONE,
Attorney for Plaintiff.

[Endorsed]: Filed July 8, 1946. [378]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the plaintiff and the defendant Glens Falls Indemnity Company, a corporation, represented by their respective attorneys of record, that said defendant Glens Falls Indemnity Company, a corporation, may file the amended answer now lodged with the Clerk of the above-entitled Court, a true copy of which is hereto

attached, and service of a copy of said amended answer is hereby accepted.

Dated September 6th, 1946.

/s/ STEPHEN MONTELEONE,
Attorney for Plaintiff.

/s/ JOHN E. McCALL,
Attorney for Defendant Glens Falls Indemnity
Company, a corporation.

It is so ordered: 9/9/46.

/s/ PEIRSON M. HALL,
Judge.

[Endorsed]: Filed Sept. 9, 1946.

[Title of District Court and Cause.]

FIRST AMENDED ANSWER OF DEFEND-
ANT GLENS FALLS INDEMNITY COM-
PANY, A CORPORATION

Comes now Glens Falls Indemnity Company, a corporation, one of the defendants in the above-entitled action, and leave of court having been first had and obtained, files this its first amended answer to plaintiff's complaint herein, and for itself alone and not for its co-defendants nor either of them, admits, denies and alleges:

I.

This defendant admits the allegations contained in Paragraphs I, II and IV of said complaint.

II.

This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph III of said complaint.

III.

Answering Paragraph V of said complaint, this defendant denies that a copy of the contract entered into between plaintiff and the United States of America referred to in said Paragraph V is too voluminous to attach to plaintiff's complaint as an exhibit, and denies that this defendant knows the contents thereof. This defendant admits each and every allegation in said Paragraph V not herein in this paragraph denied.

IV.

Answering Paragraph VI of said complaint, this defendant admits that on or about the 7th day of February, 1945, plaintiff entered into an alleged subcontract with defendants Duque & Frazzini and that a copy of said alleged subcontract is attached to plaintiff's complaint marked Exhibit "A", but this defendant denies that said alleged subcontract contained or contains any terms, provisions or conditions other than those expressly set forth in the language of the alleged subcontract itself, a copy of which is attached to said complaint marked Exhibit "A". This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations of said Paragraph VI not herein in this paragraph admitted or denied.

V.

Answering Paragraph VII of said complaint, this defendant admits that on or about the 20th day of February, 1945, it executed and delivered to plaintiff, within the Southern District of California, Central Division, a subcontract bond in the penal sum of \$101,745.55, wherein Duque & Frazzini were named as principal, and that on or about the 7th day of March, 1945, this [381] defendant addressed a letter to Basich Brothers Construction Company at Alhambra, California, which reads as follows:

“GLENS FALLS INDEMNITY COMPANY
of Glens Falls, New York
Los Angeles 13, California
March 7th, 1945

RE: Duque & Frazzini to Basich Bros.
Construction Co. Contract bond

Basich Bros Construction Co.
600 So. Fremont Ave.
Alhambra, Calif.

Gentlemen:

It is hereby understood and agreed that the 10 days appearing in paragraph ‘First’ is changed to read ‘Twenty (20) days’.

GLENS FALLS INDEMNITY
COMPANY,

[Seal] By MARWIN F. JONAS,
MARWIN F. JONAS,
Attorney.”

This defendant admits that a copy of said subcontract bond is annexed to said complaint marked Exhibit "B", but this defendant denies that said bond then contained or now contains any terms, provisions, conditions or covenants other than those expressly set forth in the language of said subcontract bond itself.

This defendant denies each and every allegation of said Paragraph VII not hereinbefore in this paragraph admitted.

VI.

Answering Paragraph VIII of said complaint, this defendant denies that said subcontract bond at any time became or remained or is now in full or any force or effect, and denies that plaintiff at any time duly or otherwise performed or complied with or fulfilled all or any of the conditions or stipulations in [382] said bond contained on its part to be performed, and says that plaintiff failed, among other things, to comply with the conditions precedent to any right of recovery by the plaintiff on said subcontract bond, in that:

Plaintiff failed to deliver to this defendant notice of default on the part of said subcontractor as required by the terms of said subcontract bond;

Plaintiff proceeded to and did continue in full control and took complete possession of all work remaining to be done under said alleged subcontract, and thereafter continued in possession and control of said work until the same was completed, contrary to the following express condition precedent contained in said subcontract bond "that the Surety

shall have the right within thirty (30) days after receipt of such notice, to proceed or procure others to proceed with the performance of such contract”;

Plaintiff failed to faithfully or otherwise perform all of the terms, covenants or conditions of said alleged subcontract on the part of plaintiff to be performed;

Plaintiff failed to retain the last payment payable by the terms of said alleged subcontract, without the consent of this defendant thereto in writing or otherwise;

Plaintiff failed to retain all or any reserves or deferred payments retainable by the plaintiff under the terms of said alleged subcontract, without the consent of this defendant thereto in writing or otherwise.

VII.

This defendant admits the allegations contained in Paragraph IX of said complaint.

VIII.

This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph X of said complaint. [383]

IX.

Answering Paragraph XI of said complaint, this defendant admits that it has not paid any labor or equipment or material bills on account of labor performed or materials or equipment furnished in connection with any subcontract with plaintiff, and denies that any labor or materials or equipment were

furnished to or for this defendant, and denies that this defendant had or has any contract with plaintiff for the payment of any bills or the performance of any work whatever. This defendant admits that some time subsequent to the 5th day of April, 1945, the exact date whereof this defendant does not know, it received a copy of letter dated April 5th, 1945 addressed to Duque & Frazzini, Tonopah, Nevada, but denies that said letter contained any language other than that expressly set forth in the letter itself, a copy of which is hereunto attached, marked Exhibit "1" and made a part hereof, and denies that said letter constituted notice to this defendant as required by the terms of the subcontract bond.

X.

Answering Paragraph XII of said complaint, this defendant denies that it fully or at all investigated any facts or conditions relative to any default by said subcontractor, either through its duly authorized agents or representatives or otherwise, or that it was thereby or otherwise fully or at all advised as to any facts thereto appertaining. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations of said Paragraph XII not herein in this paragraph admitted or denied.

XI.

Answering Paragraph XIII of said complaint, this defendant admits that it received a letter from plaintiff, by and through plaintiff's attorney Stephen Monteleone, dated April 27th, 1945, but this

defendant denies that said letter contained any language [384] other than that expressly set forth in the letter itself, a copy of which is hereunto attached marked Exhibit "2", and made a part hereof. This defendant denies that said letter constituted notice to this defendant as required by the terms of the subcontract bond. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations in said Paragraph XIII not herein in this paragraph admitted or denied.

XII.

Answering Paragraph XIV of said complaint, this defendant denies that by reason of the failure of Duque & Frazzini to perform faithfully the work contracted to be done under their said contract with plaintiff, or at their own expense to furnish all necessary material or perform all necessary labor incidental thereto, or for any other reason or at all, it became necessary for plaintiff to furnish any labor or material or equipment for the purpose of completing the work contracted to be done by Duque & Frazzini or for any other purpose, and this defendant denies that at any time or for any reason or at all, it became necessary for plaintiff to pay for any materials, or supplies or equipment used or employed by said Duque & Frazzini during the period from on or about February 19th, 1945 to on or about June 8th, 1945 or at any other time, for the purpose of completing the work contracted to be done by said Duque & Frazzini under said subcontract or for any other purpose.

XIII.

Answering Paragraph XV of said complaint, this defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations in said paragraph contained, and on that ground denies that plaintiff paid for labor or materials or supplies or equipment in the amounts set forth in said paragraph or any other sums or amounts, and on said ground [385] denies that plaintiff paid out items totaling \$85,172.63 or any other sum, and on the same ground denies each and every other allegation in said Paragraph XV contained.

XIV.

This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XVI of said complaint.

XV.

Answering Paragraph XVII of said complaint, this defendant denies that it was at all times or at any time promptly notified by registered mail or otherwise, of acts or omissions of Duque & Frazzini as alleged in said Paragraph XVII or otherwise. This defendant admits that at some time subsequent to June 11th, 1945, the exact date whereof is unknown to this defendant, it received a letter dated June 11th, 1945, from plaintiff, and admits that it took no action to perform any work alleged to have been abandoned by Duque & Frazzini. This defendant has no knowledge or information sufficient to form a belief as to the truth of the

other allegations in said Paragraph XVII, and on that ground denies all of said allegations not hereinbefore in this paragraph admitted or denied, and on the same ground denies that plaintiff expended the sum or sums mentioned in said Paragraph XVII or any other sum or amount whatever.

XVI.

This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in Paragraph XVIII of said complaint, and on that ground denies each and every allegation therein, and on the same ground denies that there is due plaintiff \$42,047.30 or any other sum or amount.

XVII.

This defendant denies that there is now due or owing or [386] unpaid from this defendant to plaintiff the sum of \$78,503.71 or any other sum or amount whatever, as alleged in Paragraph XIX of said complaint or otherwise.

XVIII.

Answering Paragraph XX of said complaint, this defendant denies that plaintiff has done or performed, fully or otherwise, each or every or any act on its part to be performed under the terms of the said subcontract bond, a copy of which is attached to plaintiff's complaint as Exhibit "B", and says that plaintiff failed, among other things, to comply with the conditions precedent to any right of recovery by the plaintiff on said subcontract bond, in that:

Plaintiff failed to deliver to this defendant notice of default on the part of said subcontractor as required by the terms of said subcontract bond;

Plaintiff proceeded to and did continue in full control and took complete possession of all work remaining to be done under said alleged subcontract, and thereafter continued in possession and control of said work until the same was completed, contrary to the following express conditions precedent contained in said subcontract bond "that the Surety shall have the right, within thirty (30) days after receipt of such notice, to proceed or procure others to proceed with the performance of such contract";

Plaintiff failed to faithfully or otherwise perform all of the terms, covenants or conditions of said alleged subcontract on the part of plaintiff to be performed;

Plaintiff failed to retain the last payment payable by the terms of said alleged subcontract, without the consent of this defendant thereto in writing or otherwise;

Plaintiff failed to retain all or any reserves or deferred payments retainable by the plaintiff under the terms of said alleged subcontract, without the consent of this defendant [387] thereto in writing or otherwise.

XIX.

Answering Paragraph XXI of said complaint, this defendant denies that by reason of any failure of this defendant to do any act or thing, whether as alleged in said complaint or otherwise, the plaintiff has suffered any loss whatever, either in the

total sum of \$78,503.71 or any other sum or amount. This defendant admits that plaintiff has demanded of it payment of said sum, but denies that any sum or amount or thing whatever is due or owing or unpaid to the plaintiff from this defendant. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations in said Paragraph XXI not herein in this paragraph admitted or denied.

First Affirmative Defense

For its first affirmative defense, this defendant alleges:

I.

That the complaint herein fails to state a claim against this defendant upon which relief can be granted.

Second Affirmative Defense

For its second affirmative defense, this defendant alleges:

I.

That all obligations of this defendant under the terms of said subcontract bond on which recovery is sought by the plaintiff in this action, a copy of which is attached to said complaint as Exhibit "B", are by the terms of said bond expressly conditioned that if the principal shall perform faithfully the work contracted to be performed under the terms of said alleged subcontract referred to in said bond,

then the obligations of said bond shall [388] be void, otherwise to remain in full force and effect, subject, however, among others, to the following provisions:

“Provided, however, as to said Obligee, and upon the Express Conditions, the performance of each of which shall be a condition precedent to any right of recovery hereon by said Obligee:

First: That in the event of any default on the part of the Principal, written notice thereof shall be delivered to the Surety, by Registered mail at its office in the City of Los Angeles promptly, and in any event within ten (10) days after the owners, or his representative, or the architect, if any, shall learn of such default; that the Surety shall have the right, within thirty (30) days after receipt of such notice, to proceed or procure others to proceed with the performance of such contract; shall also be subrogated to all the rights of the Principal; and any and all moneys or property that may at the time of such default be due, or that thereafter may become due to the Principal under said contract, shall be credited upon any claim which the Obligee may then or thereafter have against the Surety, and the surplus, if any, applied as the Surety may direct.

Second: That the Obligee shall faithfully perform all of the terms, covenants and condi-

tions of such contract on the part of the Obligee to be performed; and shall also retain the last payment payable by the terms of said contract, and all reserves and deferred payments retainable by the Obligee under the terms of said contract until the complete performance by the Principal of said contract, and until the expiration of the time within which notice of claims or claims of liens by persons performing work or furnishing materials under said contract may be filed and until all [389] such claims shall have been paid, unless the Surety shall consent, in writing, to the payment of said last payment, reserves or deferred payments."

That by the language of said subcontract bond, the plaintiff in this action is designated as "the Obligee" or "the owner" and this defendant as "the Surety."

That after the execution of said subcontract bond, and on or about the 7th day of March, 1945, at the special instance and request of the plaintiff, this defendant addressed a letter to the plaintiff in words and figures as follows:

“Glens Falls Indemnity Company
of Glens Falls, New York

Los Angeles 13, California

March 7th, 1945

RE: Duque & Frazzini to Basich Bros.
Construction Co. Contract bond

Basich Bros. Construction Co.

600 So. Fremont Ave.

Alhambra, Calif.

Gentlemen:

It is hereby understood and agreed that the
10 days appearing in paragraph ‘First’ is
changed to read ‘twenty (20) days.’

GLENS FALLS

INDEMNITY COMPANY

[Seal] By MARWIN F. JONAS,
Attorney”

II.

That plaintiff failed to comply with the aforesaid
conditions precedent, and in particular with the
following condition, among others, to wit:

“That in the event of any default on the part
of the Principal, written notice thereof shall
be delivered to the Surety, by Registered mail
at its office in the City of Los Angeles promptly,
and in any event within ten (10) days after
the owner, or his representative, or the archi-
tect, if any, shall learn of such default; * * *.”

That after the execution of said subcontract bond, and on or about the 7th day of March, 1945, at the special instance and request of the plaintiff, this defendant addressed a letter to the plaintiff which reads, in part, as follows:

“It is hereby understood and agreed that the 10 days appearing in paragraph ‘First’ is changed to read ‘twenty (20) days.’ ”

III.

That in and by the terms of plaintiff’s alleged subcontract with defendants Duque & Frazzini, it was provided that the said subcontractor should be required to produce sixteen hundred (1600) cubic yards of material per day; that said subcontractor should be required to start production of materials not later than the 19th day of February, 1945, and to furnish sixteen hundred (1600) cubic yards per day thereafter until completion, and that time should be of the essence in the performance of said alleged subcontract, all of which are more fully alleged in Paragraph IX of plaintiff’s complaint herein.

IV.

That this defendant is informed and believes and upon that ground alleges that said subcontractor defaulted in the performance of its alleged subcontract on and during every day from the 19th day of February, 1945, until on and after the 8th day of June, 1945. That said default or defaults on the part of the said subcontractor were known to or came to the knowledge of the plaintiff, designated

in said bond as Obligee or owner, or its representative, during every day of said period from February 19th, 1945, until on [391] and after the 8th day of June, 1945. That this defendant did not at any time during the said period nor does it now have any knowledge of either the nature or extent of the aforesaid default or defaults, except that this defendant is informed and believes and upon that ground alleges that said subcontractor failed during each and every day of said period to produce as much as sixteen hundred (1600) cubic yards of material, and that said subcontractor failed to start production of material on or before the 19th day of February, 1945. That the plaintiff had full knowledge of all the facts herein alleged at the time said default or defaults occurred.

V.

That plaintiff did not nor did anyone else deliver to this defendant, and this defendant did not receive notice of any default or defaults on the part of the principal as required by the terms of said subcontract bond. This defendant admits that some time subsequent to the 5th day of April, 1945, the exact date whereof this defendant does not know, it received a copy of letter dated April 5, 1945, addressed to Duque & Frazzini, Tonopah, Nevada, a copy of which is hereto attached marked Exhibit "1."

Third Affirmative Defense

For its third affirmative defense, this defendant alleges:

I.

This defendant incorporates by reference herein all the allegations contained in Paragraph I of its second affirmative defense hereinbefore set forth.

II.

That plaintiff failed to comply with the aforesaid conditions precedent, and in particular with the following conditions, among others, to wit: [392]

“* * * that the Surety shall have the right, within thirty (30) days after receipt of such notice, to proceed or procure others to proceed with the performance of such contract; * * *.”

III.

That this defendant is informed and believes and upon such information and belief alleges that on or prior to the 8th day of June, 1945, the subcontractor abandoned the work under the said alleged subcontract or was compelled by the plaintiff to cease operations thereunder, and that plaintiff proceeded to and did continue in full control and took complete possession of all work remaining to be done under said alleged subcontract, and thereafter continued in possession and control of said work until the same was completed.

Fourth Affirmative Defense

For its fourth affirmative defense, this defendant alleges:

I.

This defendant incorporates by reference herein all the allegations contained in Paragraph I of the second affirmative defense hereinbefore set forth.

II.

That plaintiff failed to comply with the aforesaid conditions precedent, and in particular, with the following condition, among others, to wit:

“That the Obligee shall faithfully perform all of the terms, covenants and conditions of such contract on the part of the Obligee to be performed. * * *.”

III.

That this defendant is informed and believes and on that ground alleges that during the period from the 11th day of [393] February, 1945, until on and after the 8th day of June, 1945, the plaintiff violated the terms of said alleged subcontract, and particularly Article XVI thereof, in that said plaintiffs paid to or for the account of said subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant does not know, in excess of ninety per cent of engineers estimate and ninety per cent of useable materials in stockpile.

IV.

That this defendant is informed and believes and upon that ground alleges that during the period from the 11th day of February, 1945, until on and after the 8th day of June, 1945, the plaintiff violated the terms of said alleged subcontract, and particularly Article XI thereof, in that said plaintiff paid to or for the account of said subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant

does not know, in excess of moneys due the subcontractor under the alleged subcontract.

V.

That this defendant is informed and believes and upon such information and belief alleges that during the period from the 11th day of February, 1945, until on and after the 8th day of June, 1945, the plaintiff furnished its own employees to do the subcontract work, furnished equipment for the performance of the subcontract work, carried all of the men who performed the subcontract work on its own payroll, named itself as employer of the men who performed the subcontract work in all Income Tax Withholding, Social Security and Unemployment Insurance returns and Workmen's Compensation Policies, carried in its own name as assured, Public Liability and Property Damage Insurance on the work being performed under said alleged subcontract, countermanded orders of the subcontractor to the men performing the subcontract [394] work, supervised and directed the production of material, and assumed and took over from the subcontractor the control and supervision of the subcontract work.

Fifth Affirmative Defense

For its fifth affirmative defense, this defendant alleges:

I.

This defendant incorporates by reference herein all the allegations contained in Paragraph I of the second affirmative defense hereinbefore set forth.

II.

That plaintiff failed to comply with the afore-said conditions precedent, and in particular with the following condition, among others, to wit:

“That the obligee * * * shall also retain the last payment payable by the terms of said contract, and all reserves and deferred payments retainable by the Obligee under the terms of said contract until the complete performance by the Principal of said contract, * * * unless the Surety shall consent, in writing, to the payment of said last payment, reserves or deferred payments.”

III.

That this defendant is informed and believes and upon that ground alleges that plaintiff failed to retain said last payment payable by the terms of said subcontract, as required by said subcontract bond, or at all, but on the contrary paid to or for the account of said subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant does not know, in excess of moneys due the subcontractor under the alleged subcontract, which said payment or [395] payments included the last payment payable by the terms of said alleged subcontract.

IV.

That this defendant is informed and believes and upon such information and belief alleges that plaintiff failed to retain all or any reserves or deferred payments retainable by plaintiff under the terms of

said alleged subcontract, as required by said subcontract bond, or at all, but on the contrary paid to or for the account of said subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant does not know, in excess of moneys due the subcontractor under the terms of said alleged subcontract, which said payment or payments included all reserves and deferred payments retainable by the plaintiff under the terms of said alleged subcontract.

V.

That the payment of said last payment and all of said reserves and deferred payments were made without the consent of this defendant thereto in writing or otherwise.

Sixth Affirmative Defense

For its sixth affirmative defense, this defendant alleges:

I.

That this defendant is informed and believes and upon that ground alleges that at the time of the execution, delivery and acceptance of said subcontract bond, the subcontractor was in default under the terms of said alleged subcontract in that, among other things said subcontractor was indebted to the plaintiff for large sums of money, the exact amount of which this defendant does not know, paid by plaintiff to or for the account of said subcontractor, on account of the subcontract work, prior to the time when any moneys were due the subcontractor

under the terms of said alleged subcontract; and said subcontractor did not commence [396] producing material under the terms of said alleged subcontract on or before the 19th day of February, 1945. That the plaintiff had reason to believe that such facts were unknown to this defendant; that the plaintiff had a reasonable opportunity to communicate such facts to this defendant; that the plaintiff failed to communicate such facts to this defendant, but on the contrary concealed such facts from this defendant by suppressing plaintiff's knowledge of the same and by failing to inform this defendant that said subcontractor was then in default in the performance of said subcontract work, with the intent to induce this defendant to execute said subcontract bond.

II.

That this defendant was wholly deceived by plaintiff's said concealment of said facts, and was thereby induced to make, execute and deliver the said subcontract bond, to this defendant's damage. That this defendant would not have made, or executed or delivered said subcontract bond if this defendant had known or had any cause whatever to believe that said subcontractor was then in default under the terms of said alleged subcontract.

Seventh Affirmative Defense

For its seventh affirmative defense, this defendant alleges:

I.

That this defendant is informed and believes and upon that ground alleges that during the period from the 11th day of February, 1945, until on and after the 8th day of June, 1945, the said alleged subcontract was materially altered by the plaintiff, acting in agreement with the subcontractor, or with the consent and acquiescence of the subcontractor, and without the knowledge or consent of this defendant by the substitution of a new executed oral contract, which oral contract altered the said alleged subcontract [397] in the particulars, among others, as hereinafter in this affirmative defense alleged.

II.

That Paragraph XVI of said alleged subcontract was altered to permit the payment by plaintiff and plaintiff did pay to or for the account of said subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant does not know, in excess of ninety per cent of engineers estimate and ninety per cent of useable materials in stockpile.

III.

That Article XI of said alleged subcontract was altered to permit the payment by plaintiff and plaintiff did pay to or for the account of said subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant does not know, in excess of moneys due the subcontractor under the alleged subcontract.

IV.

That said alleged subcontract was altered to permit plaintiff to and plaintiff did supervise and direct the production of materials and did take over and control and supervise the said subcontract work.

Eighth Affirmative Defense

For its eighth affirmative defense, this defendant alleges:

I.

That this defendant is informed and believes and upon that ground alleges that during the period from the 11th day of February, 1945, until on and after the 8th day of June, 1945, the plaintiff prematurely paid to or for the account of the said subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant does not know, [398] as hereinafter in this affirmative defense alleged.

II.

That during the period from the 11th day of February, 1945, until the date when said subcontractor produced the first materials under said alleged subcontract, which date is unknown to this defendant but which date this defendant is informed and believes and on that ground alleges was subsequent to the 19th day of February, 1945, plaintiff paid to or for the account of the subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant

does not know which payments were made prior to the date when any moneys were due to the subcontractor on account of the subcontract work.

III.

That during the period from the 11th day of February, 1945, until on and after the 8th day of June, 1945, plaintiff paid to or for the account of said subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant does not know, in excess of moneys then due the subcontractor on account of the subcontract work.

IV.

That during the period from the 11th day of February, 1945, until on and after the 8th day of June, 1945, plaintiff paid to or for the account of the subcontractor, on account of the subcontract work, large sums of money, the exact amount of which this defendant does not know, in excess of the total subcontract price.

V.

That each and all of said payments were made without the knowledge, acquiescence or consent of this defendant. [399]

Ninth Affirmative Defense

For its ninth affirmative defense, this defendant alleges:

I.

That this defendant is informed and believes and upon that ground alleges that on or about the 8th

day of June, 1945, the subcontractor abandoned the work under said alleged subcontract, or was compelled by the plaintiff to cease operations thereunder, and that plaintiff proceeded to and did continue in full control and took complete possession of all work remaining to be done under said alleged subcontract, and thereafter continued in possession and control of said work until the same was completed.

II.

That plaintiff by so taking possession and control of and proceeding with said work, elected to and did wholly waive its right to recover on said subcontract bond.

III.

That this defendant relied upon the aforesaid waiver and election of plaintiff, and so relying this defendant made no attempt whatever to exercise its right to proceed or procure others to proceed with the performance of said alleged subcontract as provided by the terms of said bond, and particularly the provisions of Paragraph "First" thereof.

Wherefore, this defendant prays that the plaintiff take nothing by its complaint; that this defendant be awarded judgment for its costs herein incurred and for such other and further relief as may appear equitable and proper.

/s/ JOHN E. McCALL,
Attorney for Defendant Glens Falls Indemnity
Company, a corporation. [400]

State of California,
County of Los Angeles—ss.

John E. McCall, being sworn, says: That he is an Attorney at Law admitted to practice before all courts of the State of California, and has his office in Los Angeles, Los Angeles County, State of California, and is the attorney for defendant Glens Falls Indemnity Company, a corporation in the above-entitled action; that said defendant is unable to make this verification because it has no officer within Los Angeles County, and for that reason affiant makes this verification on said defendant's behalf; that he has read the foregoing First Amended Answer of Defendant Glens Falls Indemnity Company, a Corporation, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

/s/ JOHN E. McCALL.

Subscribed and sworn to before me this 28th day of August, 1946.

[Seal] /s/ FRANK M. BEVERLY,
Notary Public in and for the County of Los Angeles, State of California. [401]

EXHIBIT No. 1

Basich Brothers Construction Co.

Registered Mail

April 5, 1945

Duque and Frazzini,
P. O. Box 73,
Tonopah, Nevada.

Gentlemen:

Reference is made to our Contract Agreement, dated February 7, 1945, in which you agreed to commence crushing material with one plant on February 19, 1945. It was further agreed that you were to move in two plants, each capable of producing 800 cubic yards per day of suitable material. Your attention is directed to the fact that the plant did not commence work on February 19th; furthermore, to date you have not averaged 800 cubic yards of material per plant per day.

Since we reserve the right to compel you to move in additional equipment to insure proper completion of your contract, we hereby demand that you move in additional and suitable equipment in order to produce the amount agreed upon in our contract.

Our entire concrete paving operation is dependent on your production and you are reminded that your Company is now using our tools and equip-

ment, since you do not have suitable equipment of your own on the job.

Very truly yours,

BASICH BROTHERS CON-
STRUCTION CO.,

By /s/ N. L. BASICH.

cc: Duque & Frazzini. Tucson, Ariz.

cc: Glens Falls Indemnity Co.,

Los Angeles, California.

GJP/dc

EXHIBIT No. 2

Law Offices

Stephen Monteleone

Petroleum Building

713 West Olympic Boulevard

Los Angeles 15

April 27, 1945

To Duque & Frazzini

P. O. Box 73

Tonopah, Nevada,

and

Glens Falls Indemnity Company

Of Glens Falls, New York,

801 Fidelity Building,

548 South Spring Street

Los Angeles 13, California

You and each of you are hereby notified that:

Whereas, on February 7, 1945, Basich Brothers

Construction Company, as first party, entered into a written contract with said Duque & Frazzini as second parties by the terms of which said contract said second parties, as subcontractors, agreed to perform certain of the requirements therein specifically stated in connection with the contract between first party as the Prime Contractor and the United States of America for the construction of Taxiways, warm-up and parking aprons, Job No. Davis-Monthan ESA 210-6, 210-8, and 210-9, Davis-Monthan Field, Tuscon, Arizona, Contract No. W-04-353-Eng.-1302;

Whereas, in said contract between said first party and said second parties of date February 7, 1945, it is provided, among other things, that if said second parties, as such subcontractors, shall fail to prosecute said work continuously with sufficient workmen and equipment to insure its [403] completion, first party, within five days will reserve the right to compel said subcontractors to move in another plant;

Whereas, said second parties, as such subcontractors, agreed to erect two plants, each to produce 800 cubic yards of suitable material a day to be used in connection with said Government Contract;

Whereas, said second parties agreed, in said contract of date February 7, 1945, to commence their work not later than February 19, 1945, and shall complete the same on or before June 3, 1945;

Whereas, it is therein further provided that time is of the essence of said contract;

Whereas, said second parties have failed to com-

ply with the obligations imposed on them in said contract of date, February 7, 1945, in that, among other things, they have failed to prosecute said work continuously with sufficient workmen and equipment as therein required; and further, they have failed to produce 800 cubic yards of suitable material a day from each of said two plants but instead have produced less than fifty per cent thereof;

Whereas, on April 5, 1945, said Basich Brothers Construction Company notified said Duque & Frazzini and its surety, said Glens Falls Indemnity Company, of the aforesaid failure to comply with said contract of date February 7, 1945, and demanded that additional and suitable equipment be moved on the job to produce the amount of material as in said agreement provided, all of which both said second parties and their said surety company failed to do;

Now, therefore, you, the said Duque & Frazzini, as principals, and said Glens Falls Indemnity Company as the surety of said principals, are, and each of you are, hereby notified that said Basich Brothers Construction Company will hold you and each of you responsible for all direct and consequential [404] damages sustained by them by reason by said failure to comply with said contract and any future damages, both direct and consequential, which may result by your continued failure to comply with the above requirements of said contract;

You, and each of you are hereby notified that said Basich Brothers Construction Company will exercise all reasonable efforts to minimize said damages

and will endeavor to, and if possible, will install additional and independent means to produce the required material without in any manner waiving its claims or any rights against you and each of you or in any manner releasing you of any of your obligations, past, present and future, under said contract of date February 7, 1945.

Dated: April 27, 1945.

BASICH BROTHERS CON-
STRUCTION COMPANY,
By STEPHEN MONTELEONE,
Its Attorney.

SM/gr

[Endorsed]: Filed Sept. 9, 1946. [405]

[Title of District Court and Cause.]

AMENDMENTS TO BILL OF PARTICULARS

To the Honorable, the District Court of the United
States, Southern District of California, Central
Division:

Plaintiff, Basich Brothers Construction Company, a corporation, herewith presents amendments to its Bill of Particulars on file herein as applied to Schedule VI (Insurance) of said Bill of Particulars by specifying each classification of insurance separately and the amount of premium paid thereon in connection with the subcontract of Duque & Frazzini, a co-partnership, referred to in Plaintiff's complaint as follows: [406]

Insurance Breakdown

Date	Comp.	P.L. & P.D.	A.U.R.C.	F.O.A. & Excise	Total
2/17/45	26.39	10.29	15.26	7.35	59.29
2/24/45	80.66	27.03	46.63	22.45	176.77
3/ 3/45	82.81	29.40	47.88	23.05	183.14
3/10/45	62.54	25.36	36.16	17.41	141.47
3/17/45	65.56	29.39	37.90	18.25	151.10
3/24/45	91.38	35.65	52.83	25.44	205.30
3/31/45	130.02	40.37	67.88	32.68	270.95
4/ 7/45	175.04	47.67	84.59	40.73	348.03
4/14/45	209.87	55.90	99.86	48.08	413.71
4/21/45	176.21	44.23	84.60	40.73	345.77
4/28/45	170.92	41.12	81.21	39.10	332.35
5/ 5/45	347.54	17.79	121.57	58.54	545.44
5/12/45	349.49	18.27	122.70	59.09	549.55
5/19/45	280.99	14.71	96.65	46.54	438.89
5/26/45	261.77	12.61	95.29	45.88	415.55
6/ 2/45	266.06	13.13	96.24	46.35	421.78
6/ 9/45	267.38	13.34	94.97	45.71	421.40
6/16/45	207.88	20.81	72.42	34.87	335.98
6/23/45	210.22	22.44	73.56	35.42	341.64
6/30/45	197.96	19.52	68.60	33.03	319.11
7/ 7/45	171.05	9.99	54.41	26.20	261.65
7/14/45	120.95	4.94	38.15	18.37	182.41
7/21/45	122.35	5.11	38.59	18.58	184.63
7/28/45	108.01	9.68	36.66	17.65	172.00
8/ 4/45	102.31	15.59	38.93	18.75	175.58
8/11/45	82.09	4.14	25.89	12.47	124.59
8/18/45	4.79	2.27	2.77	1.33	11.16
8/25/45	86.84	6.36	28.70	13.82	135.72
9/ 1/45	70.98	5.95	23.92	11.51	112.36
9/ 8/45	51.81	5.00	18.01	8.67	83.49
9/15/45	16.08	1.06	5.07	2.44	24.65
9/22/45	37.14	1.97	11.72	5.64	56.47
	4,635.09	611.09	1,819.62	876.13	7,941.93
	1,258.51*				1,258.51*
Totals	5,893.60	611.09	1,819.62	876.13	9,200.44

*Differential in 5506 and 1710 Rate in comp. insurance.

Explanation:

The above constitutes Insurance Breakdown on the Duque and Frazzini Subcontract.

Comp. refer to Compensation Insurance.

P.L.& P.D. refers to Public Liability and Property Damage.

A.U.R.C. refers to Arizona Unemployment Reserve Commission.

F.O.A. refers to Federal Old Age and Excise Tax.

State of California,
County of Los Angeles—ss.

Homer Thompson, being first duly sworn, deposes and says: That he is an auditor employed by Basich Brothers Construction Company and was in charge of the auditing of the accounts for said plaintiff in connection with the construction of the Government Project at Tucson, Arizona, referred to in Plaintiff's Complaint on file herein; that the herein amendment to Schedule VI of Plaintiff's Bill of Particulars on file herein contains an itemized statement of insurance paid by plaintiff for its subcontractors, Duque & Frazzini, the same being segregated into the different classification of insurance as in said amendment specified and the amounts paid on account thereof and the same is true of his own knowledge.

/s/ HOMER THOMPSON.

Subscribed and sworn to before me this 14th day of November, 1946.

[Seal] GEORGE J. POPOVICH,
Notary Public in and for said County of Los Angeles, State of California.

My commission expires Aug. 18, 1947. [409]

[Title of District Court and Cause.]

Received copy of the within Amendment to Bill of Particulars this 15th day of November, 1946.

J. E. McCALL,
By JOSEPH J. BURRIS,
Attorney for Deft. Glens
Falls I. Co.

[Endorsed]: Filed Nov. 15, 1946. [410]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated by and between the plaintiff and the defendant Glens Falls Indemnity Company, a corporation, represented by their respective attorneys of record:

1. That Basich Brothers Construction Company, a corporation, plaintiff herein, is named as employer in all withholding returns and withholding receipts which were filed with the Internal Revenue Department covering employees working on the alleged subcontract work of Duque & Frazzini;

2. That Basich Brothers Construction Company, a corporation, [411] plaintiff herein, is named as employer in all Arizona State Employment Insurance returns covering employees working on the alleged subcontract work of Duque & Frazzini;

3. That Basich Brothers Construction Company, a corporation, plaintiff herein, is named as employer in all Social Security returns made under

the Federal Insurance Contributions Act, covering employees working on the alleged subcontract work of Duque & Frazzini;

4. That Basich Brothers Construction Company, a corporation, plaintiff herein, is named as insured in all policies of insurance covering public liability and property damage on the alleged subcontract work of Duque & Frazzini;

5. That Basich Brothers Construction Company, a corporation, plaintiff herein, is named as employer in all Workmen's Compension Insurance policies covering employees working on the alleged subcontract work of Duque & Frazzini;

6. That all wages and salaries of all employees performing labor or services on the alleged subcontract between the plaintiff herein and Duque & Frazzini, dated February 7, 1945, were paid by the plaintiff Basich Brothers Construction Company, a corporation.

Dated July 1, 1946.

.....

Attorney for Plaintiff.

JOHN E. McCALL,

Attorney for Defendant Glens
Falls Indemnity Company,
a Corporation.

[Endorsed]: Filed Oct. 14, 1946. [412]

[Letterhead John E. McCall]

October 8, 1946

Mr. Stephen Monteleone
Attorney at Law
1050 Petroleum Building
714 West Olympic Boulevard
Los Angeles, California

Dear Mr. Monteleone:

Re: Basich Brothers Construction
Company vs. Glens Falls Indemnity
Company
Our File No. 2025A

You suggested that I point out the items in your Bill of Particulars to which we object. I am listing a few specific entries from the various schedules, but if you will refer to the records which your client exhibited to Mr. Vernon you will see that similar items are too numerous to set out in a letter.

(1) Time cards, weekly payroll sheets, and Basich Brothers Construction Company weekly payrolls do not indicate that the men working on the alleged subcontract job are employees of Duque & Frazzini: (Schedule I, II, III, IV and V.)

(2) These same records do not indicate that the men who were mentioned in the Bill of Particulars performed work on the alleged subcontract job: (Schedules I, II, III, IV and V).

(3) Pay checks of men claimed to have been working on the alleged subcontract job do not show

that the employees mentioned in the Bill of Particulars were employees of Duque & Frazzini: (Schedules I, II, III, IV and V). [413]

(4) Numerous improper charges have been made in the Bill of Particulars, such as:

(A) Schedule X lists one R. U. Carryall which is charged as fully operated (including operator). Schedule I charges the wages of L. E. McDaniel and Rex McCoy, the operators of the equipment, for the same period.

(B) Schedule X lists Dozer 428 as a 12½ hour charge. The blue equipment card for Dozer lists 10½ hours.

(C) Many time cards list impossible working hours. For example, Jack L. Brown, April 17, 1945, is credited with 25½ working hours, 8 hours straight time and 17½ hours overtime is a part of Schedule I.

(D) Clarence Hampton is credited with 21 hours on March 2, 1945, with only 30 minutes deducted for eating time: (Schedule I).

(E) Schedule XXIV charges three months for bins but shows they were used 7 days less than three months.

(F) Schedule XXI charges Duque & Frazzini with 179.5 truck hours on June 30, 1945. Records examined show only 99 truck hours on this date.

(G) Many of the employees listed in Schedule I of the Bill of Particulars received rates of pay which were higher than the work

classifications [414] which they performed: S. A. Moreno, a laborer, received the scale of an air tool operator; Victor Oasquez, a laborer, received the scale of a dumpman.

(H) Schedule XVII charges Duque & Frazzini a royalty on production of 2,223 tons of sand for which they receive no payment under the production credits.

If I am in error regarding any of the points mentioned, please advise me.

Yours very truly,

J. E. McCALL.

PEMcC:mc

[Endorsed]: Filed Oct. 14, 1946. [415]

Basich Brothers Construction Co.

Daily Home Office Report

(4) A. This charge for wages of McDaniel & McCoy is incorrect. Credit \$39.75.

B. Charge should be 10½ instead of 12½. Credit 20.40.

C. These hours on Jack L. Brown were submitted to us on D & F Payroll of which we have a copy of the original. We never questioned hours worked on any of Duque & Frazzini men whose time was turned in by A. Duque on their own payroll.

D. According to our records Clarence Hampton worked only 11 hrs. on March 2, 1945. This is all we claim.

E. Credit \$15.00 for overcharge of 7 days rental of 2 bins.

F. 179½ hrs. is in error. 99 hrs. are correct. Credit 332.47.

G. Due to the labor shortage, it was necessary for us to make certain concessions in order to keep the men.

H. I believe sand was included with Mineral Aggr.

[Endorsed]: Filed Oct. 14, 1946. [416]

[Title of District Court and Cause.]

AMENDMENTS TO PLAINTIFF'S COMPLAINT

Comes now the plaintiff herein and, leave of Court being first had and obtained, files these amendments to its complaint on file herein, designated as Paragraphs XXII, XXIII, XXIV, XXV, XXVI and XXVII respectively, and complains and alleges:

XXII.

That following the execution of the alleged sub-contract between plaintiff and Duque & Frazzini a copy of which is attached to plaintiff's complaint and marked Exhibit "A," said Duque & Frazzini advised plaintiff that their available cash was tied up in prior work they had completed, and were unable to meet the payroll and supplies necessary in installing and operating their plant for the per-

formance of the requirements on their part under said contract and requested plaintiff to make said payments as in said contract provided; that by reason of the above situation and in compliance with the provisions of said Exhibit "A," plaintiff made payments of labor, supply and material claims incurred by said Duque & Frazzini in the performance of said Exhibit "A" as therein provided; that at no time mentioned in plaintiff's complaint or at all did plaintiff make any payment direct to said Duque & Frazzini in the performance by them of the requirements of said Exhibit "A," or made any of said payments in any other manner except for and on account of said labor, supply and material claims, as aforesaid; that during all of said times, while plaintiff was making said payments, as aforesaid, defendant, Glens Falls Indemnity Company, was fully advised thereof; that it had, in addition thereto, investigated through its duly authorized representatives, the records of said Duque & Frazzini and of said payments and amounts earned by said Duque & Frazzini up to the date of said investigation and the manner under which all of said payments, including payments of premium and other charges on insurance required of said Duque & Frazzini under said Exhibit "A" were being made by plaintiff and thereupon charged against said Duque & Frazzini.

XXIII.

That on or about May 24, 1945, plaintiff notified said defendant in writing that said Duque & Frazzini were not paying the said labor claims and that it, said plaintiff, had previous thereto, made said labor payments, material payments and supply payments incurred by said Duque & Frazzini in the prosecution of said Exhibit "A" but that the amount of money earned by them thereunder was not sufficient to meet the past advancements made by it and said defendant and said Duque & Frazzini were therein notified to make payment of all present and future labor claims of said Duque & Frazzini in the performance of said Exhibit "A". That said [418] defendant, in reply to said demand of plaintiff, notified plaintiff in writing through its duly authorized agent, on or about June 7, 1945, that plaintiff was required to make said payments pursuant to the provisions of said Exhibit "A".

XXIV.

That at no time referred in said complaint, did said defendant, after being fully advised, as afore-said, notify plaintiff that it, plaintiff had no right to make said payments or that the making of any such payments in excess of the amount earned by said Duque & Frazzini were in violation of any of the provisions of said Exhibit "A" or the provisions and conditions of the bond executed by said defendant referred to in said complaint, nor did it, at any of said time, or at all, advise plaintiff that it would disavow its liability under said bond.

XXV.

That on or about April 5, 1945, said defendant was notified by plaintiff that said Duque & Frazzini were not meeting the quantity of material required by them under said Exhibit "A" and that additional and suitable equipment be installed as required under said Exhibit "A"; that thereafter and on or about April 27, 1945, said defendant was again notified that said Duque & Frazzini had failed to prosecute the work as required under said Exhibit "A" or provide sufficient men and equipment as therein required and if said Duque & Frazzini and said defendant failed to comply with said demands, plaintiff would adopt independent means to meet said requirements; that although said defendant was so notified and thereafter further notified of the aforesaid situation, it failed to make any provisions to remedy said situation nor did it at any time mentioned in plaintiff's complaint or at all advise plaintiff that it desired, under its said bond, to provide the means of fulfilling the requirements of said Exhibit "A" on the part of said Duque & Frazzini. [419]

XXVI.

That, by reason of the conduct and acts of said defendants, as aforesaid, it waived any rights which it may have had for any alleged failure on the part of plaintiff to comply with any of the provisions of said bond or for any alleged changes in the terms of said Exhibit "A".

XXVII.

That by reason of the conduct and acts of said defendant, as aforesaid, it is estopped from assert-

ing any rights which it may have had for any alleged failure on the part of plaintiff to comply with any of the provisions of said bond or for any alleged changes in the terms of said Exhibit "A".

Wherefore, plaintiff prays judgment as in its said complaint specified.

STEPHEN MONTELEONE and
TRACY J. PRIEST,

By /s/ STEPHEN MONTELEONE,
Attorneys for Plaintiff. [420]

State of California,
County of Los Angeles—ss.

N. L. Basich, being first duly sworn, deposes and says: That he is the President of plaintiff, Basich Brothers Construction Company, a corporation; that he has read the foregoing Amendments to Plaintiff's Complaint and knows the contents thereof and that the same is true of his own knowledge, except as to matters stated on information and belief and, as to those matters he believes the same to be true.

/s/ N. L. BASICH.

Subscribed and sworn to before me this 27th day of December, 1946.

/s/ KAY TROMBLEY,
Notary Public in and for said County of Los Angeles, State of California.

My commission expires Feb. 13, 1950.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Jan. 5, 1947.

[Title of District Court and Cause.]

ANSWER OF DEFENDANT GLENS FALLS
INDEMNITY COMPANY, A CORPORA-
TION, TO PLAINTIFF'S COMPLAINT AS
AMENDED.

Comes now Glens Falls Indemnity Company, a corporation, one of the defendants in the above-entitled action, and answering plaintiff's complaint as amended, on file herein, for itself and no other defendant, admits, denies and alleges as follows:

I.

This defendant reiterates and adopts all of the admissions, denials and allegations contained in its first amended answer herein. [423]

II.

Answering the allegations in Paragraph XXII of the complaint as amended, this defendant admits that plaintiff made certain payments on account of labor and supplies and materials used in the performance of the alleged subcontract work, but denies that said payments or any of them were made in compliance with the provisions of said Exhibit "A", and further denies that during all or any of said times this defendant was fully or at all advised thereof, and denies that this defendant learned through investigation or otherwise of said alleged payments, or of the amounts earned by Duque & Frazzini up to the date of said alleged investigation or at all, or the manner under which said alleged payments or any of them were made,

or in what manner, if any, said payments were charged against Duque & Frazzini. This defendant alleges that it is without knowledge or information sufficient to form a belief as to the truth of any of the allegations of said Paragraph XXII not herein in this paragraph admitted or denied.

III.

Answering Paragraph XXIII of the complaint as amended, this defendant admits that some time subsequent to the 24th day of May, 1945, the exact date whereof this defendant does not know, it received a letter dated May 24th, 1945, addressed to Duque & Frazzini and Glens Falls Indemnity Company of Glens Falls, New York, but denies that said letter contained any language other than that expressly set forth in the letter itself, a copy of which is attached hereto, marked Exhibit "3" and by this reference made a part hereof. This defendant admits that on or about the 7th day of June, 1945, through its attorney John E. McCall, it addressed a letter to plaintiff herein, in care of Stephen Monteleone, plaintiff's attorney, but this defendant denies that said letter notified plaintiff that it, plaintiff herein, was required to make said or any payments pursuant to the provisions of said Exhibit "A", and denies that said letter contained any language other than that expressly set forth in the [424] letter itself, a copy of which is attached hereto, marked Exhibit "4" and by this reference made a part hereof.

IV.

Answering Paragraph XXIV of the complaint as amended, this defendant denies that it was ever fully or at all advised as alleged by plaintiff in Paragraph XXIII of said complaint as amended, and denies that this defendant did not at any time, as alleged in said Paragraph XXIV, notify plaintiff that plaintiff had no right to make said or any payments, but alleges that on or about the 7th day of June, 1945, this defendant notified plaintiff, in a letter addressed to plaintiff in care of its attorney Stephen Monteleone, a copy of which said letter is hereunto attached marked Exhibit "4," that plaintiff had no right to charge anything to this defendant as Surety, inasmuch as the Surety had no liability whatever except such liability as might exist under the express terms of its bond. This defendant further alleges that on or about the 23rd day of June, 1945, in a letter addressed to plaintiff herein in care of its said attorney Stephen Monteleone, this defendant notified plaintiff that this defendant would not recognize any claim which was not expressly covered by the terms of its contract bond. That a copy of said letter of June 23rd, 1945, is attached hereto marked Exhibit "5" and by this reference made a part hereof.

V.

Answering Paragraph XXV of the complaint as amended, this defendant admits that some time subsequent to the 5th day of April, 1945, the exact date whereof this defendant does not know, it received a copy of letter dated April 5, 1945, addressed to

Duque & Frazzini, Tonopah, Nevada, a copy of which is attached to this defendant's first amended answer herein as Exhibit "1", and admits that some time subsequent to the 27th day of April, 1945, the exact date whereof this defendant does not know, it received a letter from plaintiff, by and through plaintiff's attorney Stephen Monteleone, [425] dated April 27th, 1945, a copy of which is attached to this defendant's first amended answer herein as Exhibit "2", but this defendant denies that said letters or either of them contained any language other than that expressly set forth in the said letters themselves.

VI.

Answering Paragraph XXVI of the complaint as amended, this defendant denies that it waived any right or rights which it had or now has under the terms and provisions of said subcontract bond or said subcontract as alleged in said Paragraph XXVI or at all.

XII.

Answering Paragraph XXVII of the complaint as amended, this defendant denies that it is estopped from asserting any right or rights which it had or now has by reason of the failure on the part of the plaintiff to comply with any of the provisions of said subcontract bond, or because of any alterations or changes in the terms of said subcontract referred to by plaintiff as Exhibit "A", or for any other reason or at all.

Wherefore, this defendant prays that the plaintiff take nothing by its complaint as amended; that this defendant be awarded judgment for its costs

herein incurred and for such other and further relief as may appear equitable and proper.

/s/ JOHN E. McCALL,

Attorney for Defendant Glens Falls Indemnity Company, a corporation. [426]

State of California,

County of Los Angeles—ss.

John E. McCall, being sworn, says: That he is an Attorney at Law admitted to practice before all courts of the State of California, and has his office in Los Angeles, Los Angeles County, State of California, and is the attorney for defendant Glens Falls Indemnity Company, a corporation in the above-entitled action; that said defendant is unable to make this verification because it has no officer within Los Angeles County, and for that reason affiant makes this verification on said defendant's behalf; that he has read the foregoing Answer of Defendant Glens Falls Indemnity Company, a Corporation, to Plaintiff's Complaint as Amended, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated upon information or belief, and as to those matters that he believes it to be true.

/s/ JOHN E. McCALL.

Subscribed and sworn to before me this 17th day of January, 1947.

[Seal] /s/ FRANK M. BENEDICT,

Notary Public in and for the County of Los Angeles, State of California. [427]

EXHIBIT No. 3

[Letterhead Stephen Monteleone]

May 24, 1945

To Duque & Frazzini

P. O. Box 73

Tonopah, Nevada

and

Glens Falls Indemnity Company of

Glens Falls, New York,

801 Fidelity Building

548 South Spring Street

Los Angeles 13, California

Gentlemen:

You and each of you are hereby notified:

That on February 7, 1945, Basich Brothers Construction Company, prime contractor as first party, entered into a written contract with Duque & Frazzini as sub-contractor, second parties, in connection with the construction of taxiways, warm-up and parking aprons, Job. No. Davis-Monthan ESA 210-6, 210-8 and 210-9, Davis-Monthan Field, Tucson, Arizona, Contract No. W-04-353-Eng. 1302;

Whereas, pursuant to said contract, Glens Falls Indemnity Company of Glens Falls, New York, executed, as surety, and said Duque & Frazzini as principals, a sub-contract bond in favor of Basich Brothers Construction Company in the sum of \$101,745.55, dated February 20, 1945;

Whereas, Article XI of said contract of date February 7, 1945 requires the sub-contractors to

promptly make payment to all persons supplying them with labor, materials and supplies for the prosecution of the work or in connection therewith and in the event the sub-contractor shall not make such payments, the prime contractor may make said payments and deduct from any moneys due the sub-contractor such advancements.

Whereas, it is provided in the bond of said sub-contractor of date February 20, 1945, that the principal and surety agree to pay all just labor claims arising under said contract within two weeks after demand.

You, and each of you, are hereby notified that said sub-contractors are not paying the just labor claims arising under said contract of date February 7, 1945 and, apparently will encounter difficulty in continuing the payment of said labor claims.

You, and each of you, are hereby notified that pursuant to said Article XI contained in said contract of February 7, 1945, the prime contractor has made labor payments, material payments and supply payments for said sub-contractors in the past for the prosecution of said work but that the amount of moneys due the sub-contractors is not sufficient to meet the past advancements made by the contractor Basich Brothers Construction Company; that such deficiency shall be chargeable against the sub-contractors and the above surety Glens Falls Indemnity Company. As soon as an account can be prepared on this matter, the same will be submitted to you.

will pay, among other things, the weekly payrolls for labor. You further state, on the second page of your said letter of May 24th, that you will pay labor claims and charge same to the Surety and subcontractors. You [431] of course realize that your client has no right to charge anything to the Surety, as the Surety has no liability whatever except such liability as may exist under the express terms of its bond.

Your letter of June 1st stated that you had been informed that Duque & Frazzini shut down their small crusher plant on May 31st. I communicated this information to my client, and I am advised by Mr. Bray that he has received information from the subcontractors that there was a short breakdown of the small plant, but satisfactory production has been restored.

After the receipt of your two letters of May 23rd and 24th, the writer, with Mr. John Bray, made a trip to the job at Tucson, at which time you were present, and we were advised by the subcontractors and by your client at the site of the plants crushing the rock and making the aggregates, that no time has been lost by your client because of under production, but on the contrary, there was enough material then ahead for several days concrete pouring. I am therefore unable to understand why your client wishes to put in additional equipment to take care of extra work when our information received from the subcontractors and from your client is to the effect that there has been no shortage what-

ever of aggregates to date. If this is not correct, please advise in what particular it is not correct, so that I may communicate the information to my client.

Yours very truly,

J. E. McCALL.

JEMcC:mc

cc: 2—Glens Falls Indemnity Company

1—Ralph W. Bilby, Tucson, Arizona [432]

EXHIBIT No. 5

[Letterhead John E. McCall]

June 23, 1945

Basich Brothers Construction Company
c-o Mr. Stephen Monteleone, Attorney
714 West Olympic Boulevard
Los Angeles 15, California

Gentlemen:

Your letter of June 8th, 1945 addressed to Duque & Frazzini and Glens Falls Indemnity Company, and your letters of June 11th and 14th, 1945 addressed to Glens Falls Indemnity Company, have been referred to me for attention and reply on behalf of the Glens Falls Indemnity Company only.

I do not represent the subcontractors Duque & Frazzini and do not know the full extent of their obligations to you, if any, but if you will examine the terms and conditions of the surety bond which

was posted in this case I am sure you will realize that the Glens Falls Indemnity Company is not liable to you for any labor or materials or equipment performed or furnished to said subcontractors or anyone else in connection with the job in question.

Your letter of June 8th states that you have received no co-operation from either the subcontractors or the surety except "promises and assurances." Please advise us what co-operation you think you should have received from the surety, but which you have not received. I am sure you have received no "promises and assurances" other than those expressed in the terms of the surety bond. Said contract bond contains every condition under which you [433] could have a claim or demand against the surety.

You further state that you are securing certain material and performing certain work which you are charging to the principal and surety. We do not know what agreement you may have with the subcontractors, but we are sure that you have no right to perform or furnish anything, or have anything performed or furnished and charge the same to the surety, and the surety will not recognize any claim you may make which is not expressly covered by the terms of its contract bond.

Your letter of April 5th, 1945 and several other letters received since that date state that the subcontractors did not commence work on the subcontract on February 19th, 1945 as required by the terms of their contract, but your letter of June 11th,

1945 states that you do not know when the subcontractors did commence work on the subcontract in question.

If you have wrongfully taken the contract over, as is indicated by your letters, or if you have failed to give notice required by the terms of the contract bond, or if you have failed in any other respect to perform any of the conditions precedent required of you by the terms of the bond, you can have no valid claim against the surety.

Yours very truly,

J. E. McCALL.

JEMcC:M [434]

Received copy of the within Answer this 20th day of January, 1947.

STEPHEN MONTELEONE and
TRACY J. PRIEST,

/s/ STEPHEN MONTELEONE,

By /s/ GEORGIA RICHARDS,

Attorneys for Plaintiff.

[Endorsed]: Filed Jan. 21, 1947. [435]

[Title of District Court and Cause.]

MEMORANDUM OF DEFENDANT GLENS
FALLS INDEMNITY COMPANY, A COR-
PORATION, RE PLAINTIFF'S BILL OF
PARTICULARS [436]

Plaintiff's Bill of Particulars—Schedule I

Page

1 Jack Brown—Tractor Driver

3/17/45 (Sat.) Time Card recorded 8½ hrs. Was paid for 11 hrs. Overpaid 2½ hrs. (Overtime) at \$2.25 per hr.....	\$ 5.63
3/18/45 (Sun.) Time Card recorded 8 hrs. Was paid for 16½ hrs. Overpaid 8½ hrs. at \$2.25 per hr.	19.12
4/12/45 (Thurs.) Time Card recorded 13 hrs. Was paid for 13½ hrs. Overpaid ½ hr. at \$2.25 per hr.....	1.13
4/20/45 (Fri.) Time Card recorded 6 hrs. Was paid for 8 hrs. Overpaid 2 hrs. at \$1.50 per hr.	3.00
4/22/45 (Sun.) Time Card recorded 13½ hrs. Was paid for 18½ hrs. Overpaid 5 hrs. at \$2.25 per hr.	11.25
4/23/45 (Mon.) Time Card recorded 6 hrs. Was paid for 8 hrs. Overpaid 2 hrs. at \$1.50 per hr.	3.00
5/6/45 (Sun.) Time Card recorded 11½ hrs. Was paid for 12 hrs. Overpaid ½ hr. at \$2.25 per hr.	1.12

Page

4/17/45 (Tues.) Time Card recorded 25½ hrs. Payment was made on the basis of 8 hrs. straight time and 17½ hrs. overtime, amounting to \$51.38. Time Card recorded work from 3:00 p.m. on 4/17/45 to 5:00 p.m. on 4/18/45. Should have been paid for 9 hrs. less ½ hr. lunch period or 8½ hrs. on 4/17/45, and for 17 hrs. less ½ hr. lunch period or 16½ hrs. on 4/18/45, amounting to \$44.25. Overpaid.....\$ 7.13

2 Jack L. Brown—Foreman

5/18/45 (Fri.) Time Card recorded 15½ hrs. Was paid for 17½ hrs. Overpaid 2 hrs. (Overtime) at \$2.625 per hr. 5.25

3 Sidney Cohen—Truck Driver

3/19/45 (Mon.) Time Card recorded 9 hrs. Was paid for 9½ hrs. Overpaid ½ hr. at \$1.50 per hr.75

5 Ray Hurler—Tractor Operator

5/30/45 (Wed.) Time Card recorded 11 hrs. Was paid for 12 hrs. Overpaid 1 hr. at \$2.25 per hr. 2.25

12 Vaughn P. Allred—Truck Driver

4/27/45 (Fri.) Time Card recorded 11½ hrs. Was paid for 12 hrs. Overpaid ½ hr. at \$1.50 per hr.75

Page

14 Clarence Hampton—Plant Foreman

No lunch period of $\frac{1}{2}$ hr. was deducted on the records of this employee on the following 61 days: March 20, 24, 25, 27, 28, 30, 31; April 2, 3, 4, 5, 6, 7, 9, 13, 14, 17, 18, 19, 20, 25, 26, 27, 28, 29, 30; May 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 30, 31; June 1, 3, 4, 5, 6, 7, 8. 61 days at $\frac{1}{2}$ hr. equals $30\frac{1}{2}$ hrs. at \$2.625 per hr. \$80.06

19 Frank Mariscal—Laborer

5/13/45 (Sun.) Time Card recorded 10 hrs. Was paid for 20 hrs. Overpaid 10 hrs. at \$2.0625 per hr. 20.63

5/18/45 (Fri.) Time Card recorded $10\frac{1}{2}$ hrs. Was paid for 11 hrs. Overpaid $\frac{1}{2}$ hr. at \$2.0625 per hr. 1.03

5/27/45 (Sun.) Time Card recorded $10\frac{1}{2}$ hrs. Was paid for 11 hrs. Overpaid $\frac{1}{2}$ hr. at \$2.0625 per hr. 1.03

5/28/45 (Mon.) Time Card recorded $10\frac{1}{2}$ hrs. Was paid for 11 hrs. Overpaid $\frac{1}{2}$ hr. at \$2.0625 per hr. 1.03

5/30/45 (Wed.) Time Card recorded 9 hrs. Was paid for $9\frac{1}{2}$ hrs. Overpaid $\frac{1}{2}$ hr. at \$2.0625 per hr. 1.03

6/1/45 (Fri.) Time Card recorded $10\frac{1}{2}$ hrs. Was paid for 11 hrs. Overpaid $\frac{1}{2}$ hr. at \$2.0625 per hr. 1.03

Page

6/7/45 (Thurs.) Time Card recorded
10 $\frac{1}{2}$ hrs. Was paid for 11 hrs. Over-
paid $\frac{1}{2}$ hr. at \$2.0625 per hr. \$ 1.03

6/8/45 (Fri.) Time Card recorded 10 $\frac{1}{2}$
hrs. Was paid for 11 hrs. Overpaid $\frac{1}{2}$
hr. at \$2.0625 per hr. 1.03

23 Don Tomany—Truck Driver

3/13/45 (Thurs.) This employee was
paid for 4 hrs. more than he worked.
Overpaid 4 hrs. at \$1.00 per hr. 4.00

3/24/45 (Sat.) Time Card recorded 10
hrs. Was paid for 15 $\frac{1}{2}$ hrs. Overpaid
5 $\frac{1}{2}$ hrs. at \$1.50 per hr. 8.25

3/31/45 (Sat.) Time Card recorded 10
hrs. Was paid for 14 hrs. Overpaid 4
hrs. at \$1.50 per hr. 6.00

4/14/45 (Sat.) Time Card recorded 13 $\frac{1}{2}$
hrs. Was paid for 19 hrs. Overpaid
5 $\frac{1}{2}$ hrs. at \$1.50 per hr. 8.25

4/15/45 (Sun.) Time Card recorded
11 $\frac{1}{2}$ hrs. Was paid for 14 hrs. Over-
paid 2 $\frac{1}{2}$ hrs. at \$1.50 per hr. 3.75

4/23/45 (Mon.) Time Card recorded
10 $\frac{1}{2}$ hrs. Was paid for 11 hrs. Over-
paid $\frac{1}{2}$ hr. at \$1.50 per hr.75

4/25/45 (Wed.) Time Card recorded
10 $\frac{1}{2}$ hrs. Was paid for 11 hrs. Over-
paid $\frac{1}{2}$ hr. at \$1.50 per hr.75

4/28/45 (Sat.) Time Card recorded 12
hrs. Was paid for 12 $\frac{1}{2}$ hrs. Overpaid
 $\frac{1}{2}$ hr. at \$1.50 per hr.75

Page

4/29/45 (Sun.) Time Card recorded 12 hrs. Was paid for 13 hrs. Overpaid 1 hr. at \$1.50 per hr.....	\$ 1.50
5/3/45 (Thurs.) Time Card recorded 11½ hrs. Was paid for 12 hrs. Overpaid ½ hr. at \$1.50 per hr. ....	.75
5/4/45 (Fri.) Time Card recorded 10½ hrs. Was paid for 11 hrs. Overpaid ½ hr. at \$1.50 per hr. ....	.75
5/5/45 (Sat.) Time Card recorded 2 hrs. Was paid for 5 hrs. Overpaid 3 hrs. at \$1.50 per hr.	4.50
5/7/45 (Mon.) Time Card recorded 10½ hrs. Was paid for 11 hrs. Overpaid ½ hr. at \$1.50 per hr. ....	.75
5/8/45 (Tues.) Time Card recorded 10½ hrs. Was paid for 11 hrs. Overpaid ½ hr. at \$1.50 per hr. ....	.75
5/9/45 (Wed.) Time Card recorded 10½ hrs. Was paid for 11 hrs. Overpaid ½ hr. at \$1.50 per hr. ....	.75
25 Clyde Burchfield—Crusher Operator— 4/1/45—Crusher Foreman	
4/3/45 (Tues.) Time Card recorded 11 hrs. Was paid for 12 hrs. Overpaid 1 hr. at \$2.625 per hr.	2.63
4/25/45 (Wed.) Time Card recorded 5 hrs. Was paid for 8 hrs. Overpaid 3 hrs. at \$1.75 per hr.	5.25
5/8/45 (Tues.) Time Card recorded 7½ hrs. Was paid for 8 hrs. Overpaid ½ hr. at \$1.75 per hr. ....	.88

Page

26	Clifford Gorby—Oiler	
	3/20/45 (Tues.) Time Card recorded 13 hrs. Was paid for 13½ hrs. Overpaid ½ hr. at \$1.4625 per hr.....	\$.73
27	Dallas Scott—Tractor Operator	
	3/24/45 (Sat.) Time Card recorded 10½ hrs. Was paid for 11 hrs. Overpaid ½ hr. at \$2.25 per hr.	1.13
32	Thomar O. Mosley—Shovel Operator	
	4/23/45 (Mon.) Time Card recorded 11 hrs. Was paid for 11½ hrs. Overpaid ½ hr. at \$2.4375 per hr.	1.22
	4/29/45 (Sun.) Time Card recorded 12 hrs. Was paid for 12½ hrs. Overpaid ½ hr. at \$2.4375 per hr.	1.22
	4/30/45 (Mon.) Time Card recorded 12½ hrs. Was paid for 13 hrs. Overpaid ½ hr. at \$2.4375 per hr.	1.22
33	Stacey Wailes—Oiler	
	4/8/45 (Sun.) Time Card recorded 12½ hrs. Was paid for 13 hrs. Overpaid ½ hr. at \$1.4625 per hr. ....	.73
	4/23/45 (Mon.) Time Card recorded 11 hrs. Was paid for 11½ hrs. Overpaid ½ hr. at \$1.4625 per hr. ....	.73
	4/27/45 (Fri.) Time Card recorded 5 hrs. Was paid for 8 hrs. Overpaid 3 hrs. at \$.975 per hr.	2.93
	4/30/45 (Mon.) Time Card recorded 12½ hrs. Was paid for 13 hrs. Overpaid ½ hr. at \$1.4625 per hr. ....	.73

Page

36	Charles Collins—Truck Driver	
	4/18/45 (Wed.) Time Card recorded 8 hrs. Was paid for 10½ hrs. Overpaid 2½ hrs. at \$1.50 per hr.	\$ 3.75
38	Earl Collins—Truck Driver	
	4/20/45 (Fri.) Time Card recorded 9½ hrs. Was paid for 10 hrs. Overpaid ½ hr. at \$1.50 per hr. ....	.75
40	Willard Roles—	
	Repairman & Crusher Operator	
	No lunch period of ½ hr. was deducted on the records of this employee on the following 48 days: April 5, 6, 10, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30; May 1, 2, 3, 4, 6, 7, 9, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 26, 27, 29, 30, 31; June 1, 2, 3, 4, 7, 9. 48 days at ½ hr. equals 24 hrs. at \$2.0625 per hr.	49.50
	3/31/45 (Sat.) Time Card recorded 10 hrs. Was paid for 20 hrs. Overpaid 10 hrs. at \$2.0625 per hr.	20.62
	5/28/45 (Mon.) Time Card recorded 10½ hrs. Was paid for 12 hrs. Overpaid 1½ hrs. at \$2.0625 per hr.	3.09
	6/6/45 (Thurs.) Time Card recorded 12½ hrs. Was paid for 16 hrs. Overpaid 3½ hrs. at \$2.0625 per hr.	7.22

Page

41	Fred T. Tidwell—Tractor Operator	
	No lunch period of $\frac{1}{2}$ hr. was deducted on the records of this employee on the following 42 days: April 2, 3, 4, 15, 16, 17, 18, 19, 20, 21, 22, 23, 26, 27, 29, 30; May 1, 2, 6, 8, 9, 12, 13, 14, 16, 17, 21, 22, 23, 24, 27, 28, 29, 30, 31; June 1, 2, 3, 4, 5, 7, 8. 42 days at $\frac{1}{2}$ hr. equals 21 hrs. at \$2.25 per hr.....	\$47.25
	3/27/45 (Tues.) Time Card recorded 8 hrs. Was paid for 10 hrs. Overpaid 2 hrs. at \$2.25 per hr.	4.50
42	Raymond W. Aguilar—Laborer	
	During the week of 4/15 to 4/21 this employee worked only regular hours. However, these 6 hours were extended at the Overtime rate of \$1.3125 in the total amount of \$7.88. These 6 hours should have been extended at the Regular rate of \$.875 in the total amount of \$5.25. Difference of	2.63
45	Antonio J. Espinosa—Laborer	
	4/2/45 (Mon.) Time Card recorded $8\frac{1}{2}$ hrs. Was paid for 9 hrs. Overpaid $\frac{1}{2}$ at \$1.3125 per hr. ....	.66
	4/8/45 (Sun.) Time Card recorded $11\frac{1}{2}$ hrs. Was paid for $12\frac{1}{2}$ hrs. Overpaid 1 hr. at \$1.35 per hr.	1.35
	4/10/45 (Tues.) Time Card recorded $11\frac{1}{2}$ hrs. Was paid for $12\frac{1}{2}$ hrs. Overpaid 1 hr. at \$1.35 per hr.	1.35

Page

4/12/45 (Thurs.) Time Card recorded 11½ hrs. Was paid for 12½ hrs. Overpaid 1 hr. at \$1.35 per hr.....	\$ 1.35
4/15/45 (Sun.) Time Card recorded 11½ hrs. Was paid for 12 hrs. Overpaid ½ hr. at \$1.35 per hr. ....	.68
4/30/45 (Mon.) Time Card recorded 11 hrs. Was paid for 11½ hrs. Overpaid ½ hr. at \$1.35 per hr. ....	.68
5/11/45 (Fri.) Time Card recorded 16 hrs. Was paid for 17 hrs. Overpaid 1 hr. at \$1.35 per hr.....	1.35
46 Reinaldo Morgan—Laborer	
4/2/45 (Mon.) Time Card recorded 8½ hrs. Was paid for 9 hrs. Overpaid ½ hr. at \$1.3125 per hr. ....	.66
4/8/45 (Sun.) Time Card recorded 11½ hrs. Was paid for 12½ hrs. Overpaid 1 hr. at \$1.3125 per hr.....	1.31
4/9/45 (Mon.) Time Card recorded 8½ hrs. Was paid for 9 hrs. Overpaid ½ hr. at \$1.3125 per hr. ....	.66
4/10/45 (Tues.) Time Card recorded 10 hrs. Was paid for 10½ hrs. Overpaid ½ hr. at \$1.3125 per hr. ....	.66
4/12/45 (Thurs.) Time Card recorded 11½ hrs. Was paid for 12½ hrs. Overpaid 1 hr. at \$1.3125 per hr.	1.31
4/27/45 (Fri.) Time Card recorded 9 hrs. Was paid for 11 hrs. Overpaid 2 hrs. at \$1.35 per hr.	2.70

Page

	5/11/45 (Fri.) Time Card recorded 16 hrs. Was paid for 17 hrs. Overpaid 1 hr. at \$1.35 per hr.....	\$ 1.35
47	Silas Salverson—Tractor Operator	
	4/22/45 (Sun.) Time Card recorded 10½ hrs. Was paid for 11 hrs. Overpaid ½ hr. at \$2.25 per hr.....	1.12
	4/23/45 (Mon.) Time Card recorded 11½ hrs. Was paid for 12 hrs. Overpaid ½ hr. at \$2.25 per hr.	1.13
	5/14/45 (Mon.) Time Card recorded 5 hrs. Was paid for 8 hrs. Overpaid 3 hrs. at \$1.50 per hr.	4.50
49	Kenneth E. Hopkins—Truck Driver	
	4/18/45 (Wed.) Time Card recorded 5½ hrs. Was paid for 8 hrs. Overpaid 2½ hrs. at \$1.00 per hr.	2.50
	5/2/45 (Wed.) Time Card recorded 6 hrs. Was paid for 8 hrs. Overpaid 2 hrs. at \$1.00 per hr.	2.00
	5/10/45 (Thurs.) Time Card recorded 5 hrs. Was paid for 8 hrs. Overpaid 3 hrs. at \$1.00 per hr.....	3.00
50	Bill Phillips—Truck Driver	
	4/17/45 (Tues.) Time Card recorded 6 hrs. Was paid for 8 hrs. Overpaid 2 hrs. at \$1.00 per hr.	2.00
	5/4/45 (Fri.) Time Card recorded 10½ hrs. Was paid for 11 hrs. Overpaid ½ hr. at \$1.50 per hr. ....	.75

Page

51	Teodoro M. Rhodeos—Truck Driver	
	4/17/45 (Tues.) Time Card recorded 5½ hrs. Was paid for 8 hrs. Overpaid 2½ hrs. at \$1.00 per hr.....	\$ 2.50
52	Raymond E. Collins—Truck Driver	
	5/14/45 (Mon.) Time Card recorded 11½ hrs. Was paid for 12 hrs. Overpaid ½ hr. at \$1.50 per hr. ....	.75
53	James E. Jackson—Truck Driver	
	4/17/45 (Tues.) Time Card recorded 5½ hrs. Was paid for 8 hrs. Overpaid 2½ hrs. at \$1.00 per hr.	2.50
54	Samuel A. Moreno—Laborer	
	This employee was listed as a Laborer but was paid \$.90 Regular time and \$1.35 Overtime. Laborers' rates are \$.875 Regular time; \$1.3125 Overtime. \$.025 difference times 192 Regular hrs.	4.80
	\$.0375 difference times 151½ Overtime hrs.	5.68
	5/18/45 (Fri.) Time Card recorded 6 hrs. Was paid for 8 hrs. Overpaid 2 hrs. at \$.90 per hr.	1.80
	On this page 54 the addition of the "Gross Wages" column should read \$383.15 in lieu of \$383.45 which amount was carried forward to the Summary page. Less computation error of \$.30 in footing column .....	.30

Page

55	Chester W. Sherman—Tractor Operator	
	4/30/45 (Mon.) Time Card recorded	
	12½ hrs. Was paid for 13½ hrs. Over-	
	paid 1 hr. at \$2.25 per hr.....	\$ 2.25
	5/7/45 (Mon.) Time Card recorded 11	
	hrs. Was paid for 11½ hrs. Overpaid	
	½ hr. at \$2.25 per hr.	1.13
	5/18/45 (Fri.) Time Card recorded 2½	
	hrs. Was paid for 4 hrs. Overpaid 1½	
	hrs. at \$1.50 per hr.	2.25
56	St. Aubin—Truck Driver	
	4/28/45 (Sat.) Time Card recorded 12½	
	hrs. Was paid for 13 hrs. Overpaid ½	
	hr. at \$1.50 per hr. ....	.75
	5/2/45 (Wed.) Time Card recorded 6	
	hrs. Was paid for 8 hrs. Overpaid 2	
	hrs. at \$1.00 per hr.	2.00
	5/11/45 (Fri.) Time Card recorded 7	
	hrs. Was paid for 8 hrs. Overpaid 1	
	hr. at \$1.00 per hr.	1.00
58	Frank Basurto—Laborer	
	This employee was listed as a Laborer.	
	Was paid \$.90 Regular time and \$1.35	
	Overtime. Laborers' rates are \$.875	
	Regular time and \$1.3125 Overtime.	
	\$.025 difference times 64 Regular	
	hrs.	1.60
	\$.0375 difference times 53½ Overtime	
	hrs.	2.01

Page

59 Ira T. Buchanan—Laborer

5/29/45 (Tues.) Time Card recorded
101½ hrs. Was paid for 11 hrs. Over-
paid 1½ hr. at \$1.35 per hr. \$.68

6/5/45 (Tues.) Time Card recorded
101½ hrs. Was paid for 11 hrs. Over-
paid 1½ hr. at \$1.35 per hr.68

This employee was listed as a Laborer.

Was paid \$.90 Regular time and \$1.35
Overtime. Laborers' rates are \$.875
Regular time and \$1.3125 Overtime.
\$.025 difference times 184 Regular
hrs. 4.60
\$.0375 difference times 145½ Overtime
hrs. 5.46

60 Joe M. Chavez—Truck Driver

5/2/45 (Wed.) Time Card recorded 6
hrs. Was paid for 8 hrs. Overpaid 2
hrs. at \$1.00 per hr. 2.00

5/7/45 (Mon.) Time Card recorded 6
hrs. Was paid for 8 hrs. Overpaid 2
hrs. at \$1.00 per hr. 2.00

63 Garland D. England—Truck Driver

5/28/45 (Mon.) Time Card recorded 7½
hrs. Was paid for 8 hrs. Overpaid ½
hr. at \$1.00 per hr.50

65 Sena Penrod—Truck Driver

5/19/45 (Sat.) Time Card recorded 2
hrs. Was paid for 4 hrs. Overpaid 2
hrs. at \$1.50 per hr. 3.00

Page

66	Richard J. Rojas—Truck Driver	
	5/8/45 (Tues.) Time Card recorded	
	12½ hrs. Overpaid 2 hrs. at \$1.50 per	
	hr.	\$ 3.00
67	Arthur Smith—Laborer	
	This employee was listed as a Laborer	
	but was paid \$.90 Regular time and	
	\$1.35 Overtime. Laborers' rates are	
	\$.875 Regular time; \$1.3125 Overtime.	
	\$.0375 difference times 9 Overtime hrs.	.34
68	Victor E. Vasquez—Dumpman	
	5/3/45 (Thurs.) Time Card recorded	
	6½ hrs. Was paid for 8 hrs. Overpaid	
	1½ hrs. at \$.90 per hr.	1.35
71	R. Williams—Mechanic. Heavy Duty	
	5/22/45 (Tues.) Time Card recorded 14	
	hrs. Was paid for 14½ hrs. Overpaid	
	½ hr. at \$2.0625 per hr.	1.03
	5/27/45 (Sun.) Time Card recorded 12	
	hrs. Was paid for 12½ hrs. Overpaid	
	½ hr. at \$2.0625 per hr.	1.03
	5/30/45 (Wed.) Time Card recorded 11	
	hrs. Was paid for 11½ hrs. Overpaid	
	½ hr. at \$2.0625 per hr.	1.03
	6/2/45 (Sat.) Time Card recorded 12½	
	hrs. Was paid for 13 hrs. Overpaid ½	
	hr. at \$2.0625 per hr.	1.03
	6/4/45 (Mon.) Time Card recorded 14½	
	hrs. Was paid for 15 hrs. Overpaid ½	
	hr. at \$2.0625 per hr.	1.03

Page

- 73 James L. Hill—Tractor Operator
 5/29/45 (Tues.) Time Card recorded 7½
 hrs. Was paid for 8 hrs. Overpaid ½
 hr. at \$1.50 per hr. \$.75
- 75 William O. Kirkpatrick—Truck Driver
 During the week 5/13 to 5/19 the hours
 worked as listed on this page are 8 hrs.
 Regular and 4 hrs. Overtime. 8 hrs. at
 Regular rate of \$1.00 per hr. equals
 \$8.00. 4 hrs. at Overtime rate of \$1.50
 per hr. equals \$6.00. \$8.00 plus \$6.00
 equals \$14.00. The extension for this
 week is listed as \$30.00. Error in ex-
 tension (\$30.00 less \$14.00) 16.00
- 76 John R. Roberts—Truck Driver
 5/14/45 (Mon.) Time Card recorded 4½
 hrs. Was paid for 8 hrs. Overpaid 3½
 hrs. at \$1.00 per hr. 3.50
- 77 Dana H. Burnett—Oiler
 5/22/45 (Tues.) Time Card recorded 13
 hrs. Was paid for 13½ hrs. Overpaid
 ½ hr. at \$1.4625 per hr. \$.73
- 81 Raymond S. Martinez—Laborer
 This employee was listed as a Laborer
 but was paid \$.90 Regular time and
 \$1.35 Overtime. Laborers' rates are
 \$.875 Regular time; \$1.3125 Overtime.
 \$.025 difference times 104 Regular hrs. 2.60
 \$.0375 difference times 87 Overtime
 hrs. 3.26

Page

82	Otha G. McCoy—Truck Driver 5/18/45 (Fri.) Time Card recorded 5½ hrs. Was paid for 8 hrs. Overpaid 2½ hrs. at \$1.00 per hr.....	\$ 2.50
84	Otiractous Burchfield—Dumpman 5/23/45 (Wed.) Time Card recorded 10½ hrs. Was paid for 11½ hrs. Over- paid 1 hr. at \$1.35 per hr.	1.35
90	Jack F. Merrill—Spotter 5/28/45 (Mon.) Time Card recorded 11 hrs. Was paid for 12 hrs. Overpaid 1 hr. at \$1.35 per hr.	1.35
96	Leslie McDaniel—Tractor Operator On February 19, 1945, this man operated the P. D. O. C. "Carryall" the rental of which was charged for that same day to Duque & Frazzini on a Fully Operated basis on Schedule X. This charge for time is a duplication	6.00
97	Rex McCoy—Maintainer Operator On February 20, 21 and 22, 1945, this man operated during all of those three days the P. D. O. C. "R. U. Carryall" the rental of which was charged for that same time to Duque & Frazzini on a Fully Operated basis on Schedule X. This charge for time is a duplication	33.75

General

Plaintiff has not exhibited to defendant evidence that these labor payments were proper.

Schedule II

Page

3 Hutchins—welder

This employee was listed as a Welder but was paid \$1.75 Regular time and \$2.625 Overtime. Welders' rates are \$1.375 Regular time and \$2.0625 Overtime. \$.5625 difference times 4 Overtime hrs. \$ 2.25

4 David Leon—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 362 Regular hrs. 45.25
\$.1875 difference times 344½ Overtime hrs. 64.59

5 John Smith—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 394 Regular hrs. 49.25
\$.1875 difference times 383 Overtime hrs. 71.81

Page

6 Frank Topia—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 360 Regular hrs. \$45.00
\$.1875 difference times 375 Overtime hrs. 70.31

15 Lew Stephenson—Mechanic

This employee was listed as a Mechanic but was paid \$1.50 Regular time and \$2.25 Overtime. Mechanics' rates are \$1.375 Regular time and \$2.0625 Overtime. \$.125 difference times 16 Regular hrs. 2.00
\$.1875 difference times 9 Overtime hrs. 1.69

16 Andrew Thomas—Laborer

This employee was listed as a Laborer but was paid \$.95 Regular time and \$1.425 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.075 difference times 16 Regular hrs. 1.20
\$.1125 difference times 6 Overtime hrs.68

Page

19 Luther Hart—Mechanic

This employee was listed as a Mechanic but was paid \$1.50 Regular time and \$2.25 Overtime. Mechanics' rates are \$1.375 Regular time and \$2.0625 Overtime. \$.125 difference times 2 Regular

hrs. \$.25

\$.1875 difference times 11 Overtime
hrs. 2.06

On 4/23/45 the Overtime 8 hrs. of this employee was charged to Duque & Frazzini, Regular time on this same day for Basich Bros.

On 4/26/45 the Overtime 3 hrs. of this employee was charged to Duque & Frazzini, Regular time on this same day for Basich Bros.

20 Feliciano Talavera—Laborer

This employee was listed as a Laborer but was paid \$.90 Regular time and \$1.35 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime.

\$.025 difference times 8 Regular hrs. .20

\$.0375 difference times 1½ Overtime
hrs.06

Page

23 Manuel Villareal—Laborer

On 5/2/45 (Wed.) this employee's Regular time of 7 hrs. was entered on Basich Bros. payroll sheets twice, and the 14 hrs. were added into the total 33½ hrs. Regular time for that week. This extra 7 hrs. at \$.875 per hr. amounts to \$6.12. Basich Bros. apparently caught this error before issuing the payroll check, and paid this employee for the correct \$49.44 or \$6.12 less than the \$55.56 charged to Duque & Frazzini. Overcharge..... \$ 6.12

24 Anthony Lesnett—Mechanic

This employee was listed as a Mechanic but was paid \$1.50 Regular time and \$2.25 Overtime. Mechanics' rates are \$1.375 Regular time and \$2.0625 Overtime. \$.1875 difference times 1 Overtime hr.19

General

Plaintiff has not exhibited to defendant evidence that these labor payments were proper.

Schedule III

Page

2 Jesus Fimbres—Oiler

6/10/45 (Sun.) Time Card recorded 12½ hrs. Was paid for 14 hrs. Overpaid 1½ hrs. at \$1.4625 per hr. \$ 2.19

6/11/45 (Mon.) Time Card recorded 11½ hrs. Was paid for 13½ hrs. Overpaid 2 hrs. at \$1.4625 per hr. 2.93

6/15/45 (Fri.) Time Card recorded 13 hrs. Was paid for 14½ hrs. Overpaid 1½ hrs. at \$1.4625 per hr. 2.19

3 David Leon—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 360 Regular hrs. 45.00

\$.1875 difference times 437½ Overtime hrs. 82.03

4 Raymond Martinez—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 440 Regular hrs. 55.00

\$.1875 difference times 470 Overtime hrs. 88.13

Page

6 John Smith—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 469 Regular hrs. \$58.63
\$.1875 difference times 527 Overtime hrs. 98.81

7 Frank Topia—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 136 Regular hrs. 17.00
\$.1875 difference times 197½ Overtime hrs. 37.03

10 Ted Drew—Shovel Operator

This employee was listed as a Shovel Operator but was paid \$1.75 Regular time and \$2.625 Overtime. Shovel Operators' rates are \$1.625 Regular time and \$2.4375 Overtime. \$.125 difference times 8 Regular hrs. 1.00
\$.1875 difference times 2 Overtime hrs.38

Page

11 Allen Faust—Oiler

This employee was listed as an Oiler but was paid \$1.25 Regular time and \$1.875 Overtime. Oilers' rates are \$.975 Regular time and \$1.4625 Overtime. \$.275 difference times 8 Regular hrs..... \$ 2.20
\$.4125 difference times 2½ Overtime hrs. 1.03

13 Fred Hutchins—Welder

This employee was listed as a Welder but was paid \$1.75 Regular time and \$2.625 Overtime. Welders' rates are \$1.375 Regular time and \$2.0625 Overtime. \$.375 difference times 10 Regular hrs. 3.75
\$.5625 difference times 20 Overtime hrs. 11.25

15 Charles Stitt—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 216 Regular hrs. 27.00
\$.1875 difference times 190½ Overtime hrs. 35.72

Page

18 Zetti Swinney—Laborer

This employee was listed as a Laborer but was paid \$.95 Regular time and \$1.425 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.075 difference times 328 Regular hrs. \$24.60
\$.1125 difference times 212 Overtime hrs. 23.85

21 Mitar Janicich—Laborer

This employee was listed as a Laborer but was paid \$1.125 Regular time and \$1.6875 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.25 difference times 176 Regular hrs. 44.40
\$.375 difference times 133½ Overtime hrs. 50.06

24 Gabriel Albiso—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 152 Regular hrs. 19.00
\$.1875 difference times 136½ Overtime hrs. 25.67

Page

25 Andre Thomas—Laborer

This employee was listed as a Laborer but was paid \$.95 Regular time and \$1.425 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.075 difference times 120 Regular hrs. \$ 9.00
 \$.1125 difference times 79½ Overtime hrs. 8.94

23 Encarnation Valerio—Laborer

This employee was listed as a Laborer but was paid \$1.125 Regular time and \$1.6875 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.375 difference times 10 Overtime hrs. 3.75

26 Henry Haskin—Laborer

This employee was listed as a Laborer but was paid \$.95 Regular time and \$1.425 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime, but the differences were below \$1.00 in total.

27 Joe Hayes—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime, but the differences were below \$1.00 in total.

Page

28 Enguirque Salas—Laborer

This employee was listed as a Laborer but was paid \$.95 Regular time and \$1.425 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime, but the differences were below \$1.00 in total.

34 David Mazon—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 56 Regular hrs. \$ 7.00
\$.1875 difference times 56½ Overtime hrs. 10.59

35 Feliciano Talavera—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 48 Regular hrs. 6.00
\$.1875 difference times 34½ Overtime hrs. 6.47

36 Jose Verdugo—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 8 Regular hrs. 1.00
\$.1875 difference times 2 Overtime hrs.38

Page

37 Joe McDaniels—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 32 Regular hrs. \$ 4.00
\$.1875 difference times 28 Overtime hrs. 5.25

38 Bob Black—Mechanic

This employee was listed as a Mechanic but was paid \$1.75 Regular time and \$2.625 Overtime. Mechanics' rates are \$1.375 Regular time and \$2.0625 Overtime. \$.5625 difference times 8 Overtime hrs. 4.50

39 Howard Robinson—Mechanic

This employee was listed as a Mechanic but was paid \$1.50 Regular time and \$2.25 Overtime. Mechanics' rates are \$1.375 Regular time and \$2.0625 Overtime. \$.125 difference times 22½ Regular hrs. 2.81
\$.1875 difference times 27 Overtime hrs. 5.06

40 Samuel Wilson—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Over-

Page

time. \$.125 difference times 40 Regular	
hrs.	\$ 5.00
\$.1875 difference times 11½ Overtime	
hrs.	2.16

General

Plaintiff has not exhibited to defendant evidence that these labor payments were proper.

Schedule IV

8 Raymond Lucas—Shovel Operator

6/9/45 (Sat.) This employee operated the P. D. O. C. Shovel No. 108, the rental of which was charged for the same day to Duque & Frazzini on a Fully Operated basis, Schedule XIX. Duplication of 11 hrs. Overtime at \$2.4375 per hr. 26.81

15 Maksin Pesko—Laborer

This employee was listed as a Laborer but was paid from 6/10 to 6/16 at the rates of \$.125 Regular time and \$.16875 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.25 difference times 8 Regular hrs. 2.00
\$.375 difference times 12 Overtime hrs. 4.50

Page

19 Fred Hutchins—Welder

This employee was listed as a Welder but was paid \$1.75 Regular time and \$2.625 Overtime. Welders' rates are \$1.375 Regular time and \$2.0625 Overtime. \$.375 difference times 1 Regular hr. \$.38
\$.5625 difference times 4 Overtime hrs. 2.25

General

Plaintiff has not exhibited to defendant evidence that these labor payments were proper.

Schedule V

2 Encarnation Valero—Laborer

This employee was listed as a Laborer but was paid \$1.125 Regular time and \$1.6875 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.375 difference times 10 Overtime hrs. 3.75

4 Vance Evans—Laborer

This employee was listed as a Laborer but was paid \$.90 Regular time and \$1.35 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.025 difference times 120 Regular hrs. 3.00
\$.0375 difference times 70½ Overtime hrs. 2.64

Page

6 Joe Hayes—Laborer

This employee was listed as a Laborer

but was paid \$1.00 Regular time and

\$1.50 Overtime. Laborers' rates are

\$.875 Regular time and \$1.3125 Over-

time. \$.125 difference times 163½

Regular hrs. \$20.44

\$.1875 difference times 95 Overtime

hrs. 17.81

9 Feliciano Talavera—Laborer

This employee was listed as a Laborer

but was paid from 6/10 to 8/25 at the

rates of \$.90 Regular time and \$1.35

Overtime. Laborers' rates are \$.875

Regular time and \$1.3125 Overtime.

\$.025 difference times 156 Regular hrs. 3.90

\$.0375 difference times 93 Overtime

hrs. 3.49

11 Lew Stevenson—Mechanic & Fireman

This employee was listed as a Mechanic

& Fireman but was paid \$1.50 Regular

time and \$2.25 Overtime. Mechanics' &

Firemen's rates are \$1.375 Regular

time and \$2.0625 Overtime. \$.125

difference times 131 Regular hrs. 16.38

\$.1875 difference times 93½ Overtime

hrs. 17.53

Page

17 David Mason—Laborer

This employee was listed as a Laborer but was paid from 6/10 to 8/25 at the rates of \$.90 Regular time and \$1.35 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.025 difference times 96 Regular hrs... \$ 2.40
 \$.9375 difference times 70 Overtime hrs. 2.63

18 Tom Harmon—Laborer

This employee was listed as a Laborer but was paid at the rates of \$.95 Regular time and \$1.465 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.075 difference times 8 Regular hrs.60
 \$.1525 difference times 3 Overtime hrs.46

19 Fred Hutchins—Welder

This employee was listed as a Welder but was paid \$1.75 Regular time and \$2.625 Overtime. Welders' rates are \$1.375 Regular time and \$2.0625 Overtime. \$.375 difference times 11 Regular hrs. 4.13
 \$6.5625 difference times 21½ Overtime hrs. 12.09

23 Benny Dixon—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 33 Regular hrs. 4.13

Page

24 Clarence Williams—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 33 Regular hrs. \$ 4.13
\$.1875 difference times 13 Overtime hrs. 2.44

26 Eddie Byas—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.1875 difference times 9 Overtime hrs. 1.69

27 Raymond Martinez—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 8 Regular hrs. 1.00
\$.1875 difference times 2 Overtime hrs.38

30 Eugene Miller—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 16 Regular hrs. 2.00
\$.1875 difference times 4 Overtime hrs.75

Page

31 Samuel Wilson—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 8 Regular

hrs. \$ 1.00

\$.1875 difference times 3 Overtime hrs. .56

32 Samuel Forrest—Laborer

This employee was listed as a Laborer but was paid \$1.00 Regular time and \$1.50 Overtime. Laborers' rates are \$.875 Regular time and \$1.3125 Overtime. \$.125 difference times 8 Regular

hrs. 1.00

\$.1875 difference times 2 Overtime hrs. .38

General

Plaintiff has not exhibited to defendant evidence that these labor payments were proper.

Schedule VI as Amended

Plaintiff has not exhibited to defendant evidence of authority for the rating used in computing Workmen's Compensation charges.

Plaintiff has not exhibited to defendant evidence to show [465] that Duque & Frazzini were protected in any way by a Public Liability and Property Damage policy under which charges are made, \$611.09.

Comments on Schedules I to V illustrate that all charges in Schedule VI as amended are computed on incorrect totals.

Schedule VII

Plaintiff has not exhibited to defendant evidence showing authority to use the equipment on the sub-contract work or to charge any amounts to the defendant.

Schedule VIII

Plaintiff has not exhibited to defendant evidence showing authority to use the equipment on the sub-contract work or to charge any amounts to the defendant.

Schedule IX

Plaintiff has not exhibited to defendant records of production measurements for this equipment on which royalty charges are based, as per contract between plaintiff and Duque & Frazzini, dated May 1, 1945, defendant's Exhibit "B".

This Schedule shows royalty charges for sand production on the basis of 995 tons. Schedule XVII shows royalty charges for sand production on the basis of 2,223 tons, a total of 3,218 tons of sand. The credit allowed for sand production in Schedule XXXIV (XLIV), however, is 751 tons of sand.

Schedule X

Page

- 1 4/5/45 Time card recorded 10 $\frac{1}{2}$ hrs. for Dozer 428. Payment for 8 hrs. Regular time and 4 $\frac{1}{2}$ hrs. Overtime. Overpaid 2 hrs. at \$10.20 per hr.\$20.40

Comments on Schedule I, pp. 96 and 97, indicate duplication of labor charge where carryall was listed on a fully operated basis. Plaintiff has not exhibited to defendant evidence showing authority to use the equipment on the subcontract work or to charge any amounts to the defendant.

Schedule XI

Plaintiff has not exhibited to defendant evidence showing authority to use the equipment on the subcontract work or to charge any amounts to the defendant.

Schedule XII

Plaintiff has not exhibited to defendant evidence showing authority to use the equipment on the subcontract work or to charge any amounts to the defendant.

Schedule XIII

Plaintiff has not exhibited to defendant evidence showing authority to use the equipment on the subcontract work or to charge any amounts to the defendant. [467]

Schedule XIV

Plaintiff has not exhibited to defendant evidence showing authority to use the equipment on the subcontract work or to charge any amounts to the defendant.

Schedule XV

Plaintiff charged Duque & Frazzini the standard rate for this equipment which apparently includes profit.

Schedule XVI

Plaintiff charged Duque & Frazzini the standard rate for this equipment which apparently includes profit.

Schedule XVII

Plaintiff charged Duque & Frazzini the standard rate for this equipment which apparently includes profit.

Plaintiff has not exhibited to defendant records of production measurements for this equipment on which royalty charges are based.

See also comments on Schedule IX.

Schedule XIX

Comments on Schedule IV, p. 8, indicate duplication of labor charge where Shovel No. 108 was listed on a fully operated basis. [468]

Schedule XX

Plaintiff has not exhibited to defendant records of production measurements for this equipment on which royalty charges are based.

Schedule XXI

Page

1	6/30/45 J. G. North's yellow time sheets and Mr. Thompson's Journal book recorded 99 truck hrs. Payment for 179½ truck hrs. Overpaid 80½ hrs. at \$4.13 per hr.	\$332.47
3	8/22/45 J. G. North's yellow time sheets recorded 56 truck hrs. Payment for 77 truck hrs. Overpaid 21 hrs. at \$4.13 per hr.	\$86.73

Schedule XXII

Invoices from Phoenix Tempe Stone to Plaintiff of \$2,761.58 for the use of this equipment were not on a fully operated basis. Plaintiff charged Duque & Frazzini \$6,102.05, the standard rate for fully operated equipment which apparently includes profit.

Schedule XXIV

Two bins rented for 2 months and 23 days. Plaintiff charged Duque & Frazzini for 3 full months. Overcharged 7 days at \$90.00 per month

\$21.00

Schedule XXVI

Plaintiff has not exhibited to defendant evidence showing authority to repair the equipment or to charge any amounts to defendant.

Schedule XXVII

Plaintiff has not exhibited to defendant evidence showing authority to purchase parts for the equipment or to charge any amounts to defendant. Plaintiff has not exhibited to defendant evidence showing the equipment on which such parts were used.

Schedule XXVIII

Plaintiff has not exhibited to defendant evidence showing authority to use parts from plaintiff's stock or to charge any amounts to defendant. Plaintiff has not exhibited to defendant evidence showing the equipment on which such parts were used.

Schedule XXIX

Plaintiff has not exhibited to defendant evidence showing authority to issue fuel, grease and oil for equipment or to charge any amounts to defendant. Plaintiff has not exhibited to defendant evidence showing where such fuel, grease and oil were used.

Schedule XXX

Plaintiff has not exhibited to defendant evidence showing authority for moving and setting up the Pioneer Crusher, Tucson Mac E. Eng., providing accounting services, telephone charges or authority to charge any amounts to defendant. [470]

Schedule XXXI

Plaintiff has not exhibited to defendant evidence showing authority to pay freight on equipment or to charge any amounts to defendant. The absence of dates on this Schedule prevents vouching to specific invoices.

Schedule XXXII

Plaintiff has not exhibited to defendant evidence showing the equipment on which such repairs were made.

Schedule XXXIII

Plaintiff has not exhibited to defendant evidence showing the equipment on which the parts were used.

Schedule XXXIV

No dates were given on this Schedule. Plaintiff has not exhibited to defendant evidence showing authority to use parts from plaintiff's stock or to charge any amounts to defendant. Plaintiff has not exhibited to defendant evidence showing the equipment on which such parts were used.

Schedule XXXV

Plaintiff has not exhibited to defendant evidence showing the equipment on which such fuel, grease and oil were used.

Schedule XXXVI

Plaintiff has not exhibited to defendant evidence of authority for the rating used in computing Workmen's Compensation charges. [471]

Schedule XXXVII

Plaintiff has not exhibited to defendant evidence showing authority to pay freight on equipment or to charge any amounts to defendant. The absence of dates on this Schedule prevents vouching to specific invoices.

The Fully Operated Shovel 37B, owned by Phoenix Tempe Stone Co., was left for plaintiff's use on the express condition that there should be no freight charge to Duque & Frazzini for its return\$360.50

Schedule XXXVIII

The total quantity in this schedule should be 54,864 c.y., not 54,764 c.y.

100 c.y. at \$.46 c.y.....Add \$46.00

Schedule XXXIX

Article XXII, Item 11 of the alleged subcontract, Plaintiff's Exhibit "1" provides as follows for this Item. "Measurement to be computed on truck water level." Measure for purposes of credit to Duque & Frazzini is made by this Schedule dividing square yards in place by 15.

Further, this Schedule does not credit Duque & Frazzini with 32,751 sq. yd. as shown on U. S. Engineers' Estimates No. 13 Extension, June 15 to July 31, 1945, Defendant's Exhibit "D."

Schedule XXXXII (XLII)

Engineers' Estimates for Items No. 26A and 26B were 24,500.16 tons, Defendant's Exhibit "D." Plaintiff has not exhibited to Defendant evidence of authority to deduct oil tonnage or evidence [472] that oil tonnage deductions are not included in the Engineers' Estimates. Difference of 841.81 tons at \$.65 per tonAdd \$547.18

Schedule XXXIV (XLIV)

See comments on Schedule IX.

Received copy of the within memorandum this 31st day of January, 1947.

STEPHEN MONTELEONE and
TRACY J. PRIEST,
By STEPHEN MONTELEONE,
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 4, 1947. [473]

[Title of District Court and Cause.]

DECISION AND ORDER FOR
JUDGMENT AND FINDINGS

The above-entitled cause, heretofore tried, argued and submitted, is now decided as follows:

Judgment will be for the plaintiff and against defendants as prayed for in the Complaint, the exact amount to be computed under Local Rule 7(g) by counsel for the plaintiff, in conformity with the corrected bill of particulars as finally proved at the trial of the cause.

Findings and Judgments to be prepared by counsel for the plaintiff under Local Rule 7.

I am of the view, after a full consideration of the case in the light of the additional testimony introduced on February 4th and 5th, 1947, that the plaintiff is entitled to recover and that the evidence

does not sustain any of the defenses which have been raised by the averments in the [474] Answer or as legal propositions based upon the facts as a whole.

Ordinarily, no other direction would be necessary. However, because of the nature of the case, and the desire for a quick determination, and in order to avoid any dispute as to the certain special issues arising in the case, I indicate, as I have done repeatedly in cases of this character, certain special findings and conclusions. These relate particularly to the defenses interposed either by specific allegations or urged as legal principles. They are stated, in the main, in the order in which they appear in the affirmative defenses, although the particular defenses may not necessarily be referred to in each instance.

So I find:

I.

The Complaint states a claim upon which relief can be granted and the evidence fully establishes such claim.

II.

The defendant surety company has had notice of any and all complaints, deficiencies and failures in the performance of the contract by Duque & Frazzini, the obligee and subcontractor, of which the plaintiff complains.

III.

Prior to the final abandonment of the work by Duque & Frazzini on June 8, 1945, notice of which

was given on the same day by letter to the surety and obligee, various complaints had been brought to the attention of the surety of deficiencies in the work. They sent a representative who had access to all the books and who sought to secure the improvement of conditions.

IV.

On the final abandonment of the work on June 8, 1945, immediate notice was given to the surety and obligee [475] of such abandonment and of previous complaints about the nature of the work. In said letter request was made for full performance by them and notice given that any action to be taken by the plaintiff was merely to minimize damage. No offer to perform was made by the surety. Nor did they request the plaintiff to desist from continuing the work in order to minimize damage, until adjustment or until the surety company chose to take over further performance. On the contrary, the surety's answer to that and subsequent letters—especially the letter of the counsel for the surety, dated June 23, 1945—merely referred to the contract as the measure of their liability. And, while notifying the plaintiff that the surety “will not recognize any claim (they) may make which is not expressly covered by the terms of its contract bond,” it, at no time, asked a cessation of labor or indicated a desire to take over performance of the contract of the obligee. Under the circumstances, the defendant cannot claim that it was not given an opportunity to proceed with performance, as it alleges in the third affirmative defense.

V.

Plaintiff has performed faithfully with the condition of the contract of surety and has not violated any of the conditions of the subcontract. More particularly, with reference to the allegations of the fourth affirmative defense, I find, as expressed orally at the conclusion of the trial, that the arrangement whereby the plaintiff paid direct to the laborers their wages earned from the obligee upon weekly payrolls furnished and certified to by the obligee, was not a violation of the terms of the contract, but was an arrangement made for the benefit of the obligee which inured also to the benefit of the surety who had knowledge of the fact, as their representative not only had [476] access to the payrolls and books, but actually had examined them during the period in which the payments were being made.

For like reason, the surety cannot complain and was not injured by the fact that the employees of the obligee were carried on the plaintiff's rolls for the purpose of income tax withholding, social security and unemployment insurance returns, workmen's compensation policies, public liability and property damages. Nor can surety complain because the plaintiff rented directly to, or through others for the benefit of, the obligee, equipment needed by them in the performance of the contract. As to all these, the evidence shows conclusively that the arrangement was made for the benefit of the obligee, that the amounts paid out were upon the order of the obligee and were the reasonable value

of the services and materials secured and the equipment furnished. No profit was charged against the obligee on any of these advances, and where the equipment furnished was owned by plaintiff, the charge was the regular OPA charge which it has also been shown without contradiction to be reasonable.

VI.

No payments have been made to the contractor other than called for by the subcontract by the plaintiff and the obligee. While it is true that some payments were made for labor, materials and the like, before any actual payments were due to the subcontractor, these were merely in the form of bookkeeping entries showing charges and advances made for the benefit of the obligee. At no time did the sums so advanced exceed the progress payments and if the last charges and advances did so exceed the progress payment, it is merely because upon the abandonment of the contract, the surety did not choose to take over the contract [477] for completion and the plaintiff was compelled to complete the same.

All these facts were known to the surety who had access to the books and actually investigated them. Under the circumstances, there was no concealment of which the surety can complain.

VII.

I find that the plaintiff has not, at any time, by any act which it did prior or subsequent to June 8, 1945, waived or abandoned its right to demand full

performance of the contract. In this respect, I find specifically that the arrangement whereby the payments set forth in Finding V were made did not constitute in law a change in the terms of the contract or an alteration in the relationship between the plaintiff and the obligee affecting the rights of the surety. Also, that it is not true, as alleged in the eighth affirmative defense, that the plaintiff did, at any time, control or direct the employees of the obligee, but that, on the contrary, they were, at all times until the abandonment of the work, under the sole and exclusive control of Duque & Frazzini or their agents. Consequently, although the contract of the surety is, as I determined previously, at the hearing of November 25, 1946, to be governed by California law, there has been no deviation in its terms which can be called of substance. On the contrary, its terms have been complied with substantially by the plaintiff and the obligee, and such deviations as were made as to advances or manner of computing work did not change the contract in any substantial manner, and were made with the consent of the obligee and for their benefit and the benefit of the surety, and that the surety had actual knowledge or means of knowledge, and by failing to raise any objection [478] waived a more strict compliance.

IX.

I find that not only do the facts show a waiver in the matters just referred to, but that the entire

conduct of the surety amounts to waiver of performance of the conditions of which they complain in the special defenses and as to all other matters.

X.

In all their negotiations, the conduct of the surety in dealing with any complaints which came to their attention, even after the abandonment, was such that they lulled the plaintiff into a feeling of security that efforts were being made to adjust the differences and that no affirmative action was forthcoming on the part of the surety. An attitude like this is like the "indulgence" extended to one after a complaint of fraud is made and which results in delay of rescission. He who induces such indulgence is not in a position to complain of it. (*Noll v. Baida*, 1927, 202 C. 105, 108; *Hunt v. L. M. Field Inc.*, 1927, 202 C. 701, 704.)

So the plaintiff here is entitled to a finding of waiver and estoppel as pleaded in the amendment to the complaint, filed on December 28, 1946.

Dated this 11th day of February, 1947.

/s/ LEON R. YANKWICH.

United States District Judge.

Counsel notified.

[Endorsed]: Filed Feb. 11, 1947. [479]

[Title of District Court and Cause.]

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

The above entitled action came on regularly for trial in the District Court of the United States, Southern District of California, Central Division, before the Honorable Leon R. Yankwich, Judge presiding, on the 25th day of November, 1946, and thereupon regularly continued for further proceedings which were had on the 4th day and 5th day of February, 1947, Stephen Monteleone, Esq., and Tracy J. Priest, Esq., appearing as attorneys for plaintiff, Basich Brothers Construction Company, a corporation, and John E. McCall, Esq., appearing as attorney for the [480] defendant, Glens Falls Indemnity Company, a corporation; (defendants Andrew Duque and Carson Frazzini, co-partners, doing business under the name of Duque & Frazzini, not having been served with summons and not having appeared, the trial proceeded against the defendant, Glens Falls Indemnity Company, a corporation, alone).

A jury trial having been duly waived by the respective parties, the cause was tried before the Court without a jury, whereupon evidence, both oral and documentary, was introduced by and on behalf of said plaintiff Basich Brothers Construction Company, a corporation, and said defendant Glens Falls Indemnity Company, a corporation, respectively, and the Court having heard and con-

sidered said evidence, together with the argument of respective counsel for said plaintiff and said defendant, and being fully advised in the premises, now makes its Findings of Fact and Conclusions of Law as follows:

Findings of Fact

I.

The Court finds that each, every and all allegations contained in Paragraphs I, II, III and IV of plaintiff's complaint on file herein are true.

II.

The Court finds that on the 25th day of January, 1945, said plaintiff, Basich Brothers Construction Company, a corporation, hereinafter referred to as "Basich," entered into a certain written contract with the United States of America by and through the Engineering Department thereof, for the furnishing of materials and performing of work for the construction of taxiways, warm-up and parking aprons, airfield lighting, drainage facilities and water service lines, together with appurtenant facilities necessary [481] at what is known as Davis-Monthan Airfield near Tucson, Arizona, said contract being known as No. W-04-353-Eng-1302 and having job No. Davis-Monthan E.S.A. 210-6, 210-8 and 210-9.

III.

The Court finds that on the 7th day of February, 1945, said plaintiff, "Basich" and said Duque & Frazzini entered into a written subcontract for the performance of certain work and the furnishing of certain material as set forth in said subcontract, a true copy of which said subcontract is attached to plaintiff's said complaint, marked Exhibit "A" and made a part thereof, and was received in evidence as plaintiff's Exhibit 1; that the work to be performed and the material to be furnished under said subcontract by said Duque & Frazzini were essential to the performance by plaintiff of the work required to be performed under said contract with the United States of America.

IV.

The Court finds that on February 20, 1945, and in conformity with the requirements of Article XXII of said subcontract, defendant, Glens Falls Indemnity Company, a corporation, hereinafter referred to as "Glens Falls," for a valuable consideration paid to it as a premium, made, executed and delivered to plaintiff within the Southern District of California, Central Division, a subcontract bond in the penal sum of \$101,745.55, wherein said Duque & Frazzini, as principal, and said defendant, Glens Falls, as surety are, by the terms thereof, held and firmly bound unto plaintiff, Basich, for the faithful performance of the work to be done under the terms of the aforesaid subcontract between plaintiff and said Duque & Frazzini.

That a true copy of said subcontract bond is attached to plaintiff's complaint, marked Exhibit "B" and made a part thereof and was received in evidence as plaintiff's Exhibit 2; that on March 7, 1945, defendant, Glens Falls, modified in writing said bond by adding thereto the following: "It is hereby understood and agreed that the 10 days appearing in Paragraph 'First' is changed to read twenty (20) days."

V.

The Court finds that the aforesaid subcontract between plaintiff and said Duque & Frazzini and the aforesaid subcontract bond executed by the defendant, Glens Falls, as surety, constitute the agreement between plaintiff and said Duque & Frazzini and said defendant, Glens Falls. The Court finds that it was the intention of the parties that provisions of said subcontract to be performed by said Duque & Frazzini were and are obligations included within the obligations of said subcontract bond.

VI.

The Court finds that at all times herein mentioned following the execution and delivery of said bond by defendant, Glens Falls, to plaintiff, Basich, as aforesaid, said bond remained in full force and effect and still is in full force and effect.

VII.

The Court finds that plaintiff has fully done and performed each and every act in its part to be performed under the terms of said subcontract and said subcontract bond and has fully done and complied with each and every condition precedent therein contained required of it to be performed by said subcontract and said subcontract bond in order to entitled plaintiff to recover from said defendant, Glens Falls, for all losses sustained by said plaintiff by reason of the failure of said Duque & Frazzini to faithfully perform the requirements of said subcontract as found in these Findings of Fact.

VIII.

The Court finds that each and every allegation contained in Paragraph IX of said complaint is true. [483]

IX.

The Court finds that said Duque & Frazzini entered upon the performance of the requirements of their said subcontract with plaintiff, but failed to prosecute said work therein required of them continuously with sufficient workmen and/or equipment, or to erect two plants each capable of producing 800 cubic yards of suitable material a day and that after commencing work under said subcontract and, on or about April 5, 1945, said Duque & Frazzini failed to have or thereafter to maintain sufficient workmen and/or sufficient equipment as in said subcontract required of them.

X.

The Court finds that said Duque & Frazzini after they commenced work, as required in said subcontract, failed to pay labor or equipment or material bills, hereinafter specifically found, on account of labor performed and/or materials and/or equipment furnished to them in connection with the performance of said subcontract with plaintiff and further said Duque & Frazzini failed to faithfully perform the work and requirements therein contracted to be done as herein specifically found. That on account of the failure of said Duque & Frazzini to perform faithfully the work contracted to be done as in said subcontract specified, plaintiff did, under date of April 5, 1945, by registered mail, notify said defendant, Glens Falls, and said Duque & Frazzini that the plant of said Duque & Frazzini was not producing 800 cubic yards of suitable material as required in said subcontract and that Duque & Frazzini move in additional equipment to insure proper completion of their said subcontract. That the notice given to said defendant, Glens Falls, as aforesaid, constituted notice to said defendant as required by the terms of said subcontract bond. [484]

XI.

The Court finds that said Duque & Frazzini thereafter continued to work under said subcontract with plaintiff until its final abandonment on June 8, 1945, and that said defendant Glens Falls, following said notice of April 5, 1945, through its duly au-

thorized agents and representatives, fully investigated the facts and conditions relative to said complaint in said notice contained and was thereby fully advised of all of the facts thereto pertaining.

XII.

The Court finds that on or about April 27, 1945, said Duque & Frazzini, having still failed to faithfully perform the work contracted to be done under said subcontract with plaintiff, plaintiff did, under date of April 27, 1945, by registered mail, notify said defendant, Glens Falls, and said Duque & Frazzini of the failure of said Duque & Frazzini to faithfully perform the work required of them under said subcontract and that plaintiff would make all reasonable efforts, either in attempting to procure sufficient equipment to produce the deficiency in material required of said Duque & Frazzini under said subcontract, or attempt to procure the deficiency of materials through other sources and make all charges or other reasonable expenses in connection therewith against said defendant, Glens Falls, and said Duque & Frazzini.

XIII.

The Court finds that plaintiff, upon acquiring knowledge of any and all failures of Duque & Frazzini to comply with any of the provisions of the subcontract, properly complied with all conditions precedent of the bond and gave notice thereof to defendant, Glens Falls, in the manner and within

the time in said bond provided and that said defendant, Glens Falls, was afforded an opportunity by plaintiff in accordance with the condition precedent of said bond to see that the provisions of the subcontract [485] were complied with.

XIV.

The Court finds that plaintiff, at no time, waived any of its rights, nor did it at any time elect to perform, nor did it perform any act inconsistent with the conditions of the subcontract bond or the right of said plaintiff to collect upon said bond for all losses occasioned by the subcontractor's default.

XV.

The Court finds that from the commencement of said work by said Duque & Frazzini under said subcontract up to and until the abandonment thereof on June 8, 1945, plaintiff paid direct to laborers employed by said Duque & Frazzini wages of said laborers earned from said Duque & Frazzini upon weekly payrolls furnished and certified to by said Duque & Frazzini in the amounts hereinafter specifically found and also paid Workmen's Compensation Insurance, Arizona Unemployment Reserve Commission, Federal Old Age and Excise Tax in the amounts hereinafter specifically found; that each and all of said payments were required to be made by said Duque & Frazzini under said subcontract and were made by plaintiff, as aforesaid, in accordance with an arrangement provided in said subcontract for the benefit of said Duque &

Frazzini and which also inured to the benefit of said defendant, Glens Falls, who had, at all times herein mentioned, knowledge of the manner and amounts of said payments.

The Court finds that from the commencement of said work by Duque & Frazzini under said subcontract until the abandonment thereof on June 8, 1945, plaintiff rented direct to, or through others for the benefit of said Duque & Frazzini and on the orders of said Duque & Frazzini, certain equipments, in the amounts hereinafter found, and also sold direct to, or through others for the benefit of said Duque & Frazzini, and on the orders of said Duque & Frazzini, certain supplies and material, in the amounts hereinafter [486] specifically found.

XVI.

The Court finds that all of the labor, insurance, equipment, supplies, materials and other items hereinabove specified furnished or paid by plaintiff for the benefit of said Duque & Frazzini were necessary for and were actually employed by said Duque & Frazzini in the performance of said subcontract and the respective amounts thereof for each and every item was and is reasonable and fair.

XVII.

The Court finds that the amount of labor, insurance, rentals on equipment, material supplies and other items paid or furnished by plaintiff for the benefit of said Duque & Frazzini as hereinabove

found, are fully, correctly and specifically set forth in the Bill of Particulars and Amendments thereto as corrected on file herein and consist of the following general subject and amount, to-wit:

Payroll for labor	\$47,174.32
Insurance	6,202.74
Equipment rental	24,438.70
Supplies	8,130.74
Or a total of	\$85,946.50

The Court finds that each and all of the above items and all of the above items were and are reasonable and were necessarily expended in the performance of said subcontract work, as aforesaid and that the said respective sums are the actual payments made by plaintiff for the account of said Duque & Frazzini or the reasonable rental value of the equipment furnished said Duque & Frazzini in the performance of said subcontract as hereinabove found.

XVIII.

The Court finds that during the period of time from the [487] commencement of said work by said Duque & Frazzini under said subcontract up to the abandonment thereof on June 8, 1945, said Duque & Frazzini had earned, under said subcontract with plaintiff a gross amount of \$56,080.11 all of which amount is fully, correctly and specifically set forth in said Bill of Particulars on file herein. The Court therefore finds that said Duque & Frazzini and defendant, Glens Falls are entitled to credit up to the date of the abandonment of said subcon-

tract on June 8, 1945, in said sum of \$56,080.11, leaving a balance due, owing and unpaid on said 8th day of June, 1945, from said Duque & Frazzini and said defendant, Glens Falls, in the principal sum of \$29,866.39, together with interest thereon at the rate of seven per cent per annum from the 8th day of June, 1945, on account of the facts herein found.

XIX.

The Court finds that on June 8, 1945, before the completion by Duque & Frazzini of the work provided for in said subcontract with plaintiff, said Duque & Frazzini notified plaintiff in writing that they were suspending their said operation and thereupon and on said 8th day of June, 1945, without the consent of plaintiff, and without any fault on the part of plaintiff, said Duque & Frazzini finally and completely abandoned said work; that said defendant, Glens Falls, was, at all times, promptly notified by registered mail of the aforesaid acts and omissions of said Duque & Frazzini and upon the abandonment of said operations on June 8, 1945, plaintiff thereupon and on June 11, 1945, notified said defendant, Glens Falls, by registered mail that, as surety of said Duque & Frazzini, it take such action as it may deem proper and that until it did so plaintiff, as Prime Contractor, upon demand of the War Department, would proceed with the work for the benefit of said Duque & Frazzini and said defendant Glens Falls, and would comply with their reasonable instructions. That

said defendant, Glens Falls, however, took no action whatever in the completion of the work abandoned by said Duque & Frazzini, as aforesaid, and plaintiff was compelled to complete the same.

The Court finds that said plaintiff did, at its own expense, furnish all necessary labor, material and equipment to complete, and did complete the work covered by its said subcontract with Duque & Frazzini after the same was abandoned, as aforesaid; that plaintiff necessarily and actually expended the amounts and furnished labor, material, machinery and equipment in completing said subcontract after said abandonment thereof all of which are fully, correctly and specifically set forth in said Bill of Particulars and the said amendment, as corrected, and consist of the following general subject and amounts:

Payroll for labor	\$ 18,284.16
Insurance	2,521.44
Equipment rental	79,612.65
Repairs, parts, supplies and miscellaneous labor	15,052.11
Or a total amount of	\$115,470.36

XX.

The Court finds that each, every and all of said above items were necessarily and actually expended by plaintiff in completing the work agreed to be done and performed by Duque & Frazzini after the abandonment thereof, as aforesaid, and the said respective sums were and are the reasonable and

fair cost thereof and the actual cost to plaintiff of labor, materials, supplies, rental and equipment necessarily required in the completion of said subcontract for the account of said Duque & Frazzini, subcontractor.

XXI.

The Court finds that said Duque & Frazzini and defendant, Glens Falls, are entitled to a credit of \$65,753.84 on account of the gross earnings based on the subcontract price which would have been due said Duque & Frazzini from the date of said abandonment [489] on June 8, 1945, had they fully performed the said subcontract work. That there is, therefore, a further balance due, owing and unpaid from said Duque & Frazzini and defendant, Glens Falls, to plaintiff by reason thereof in the principal sum of \$49,716.52 together with interest thereon at the rate of seven per cent per annum from the date of the completion of said work on September 25, 1945, on account of said subcontractor's default and abandonment of said work on June 8, 1945. That said principal sum of \$49,716.52 together with interest thereon at seven per cent per annum from September 25, 1945, is the actual loss to plaintiff by reason of the subcontractor's abandonment of said work, as aforesaid.

XXII.

The Court finds that by reason of the default of said Duque & Frazzini, as herein found, and by reason of their failure to faithfully perform said

subcontract in accordance with the terms, as herein found, plaintiff has suffered a loss in the total principal sum of \$79,582.91, together with interest as hereinabove found. That although said Duque & Frazzini and defendant, Glens Falls, and each of them have been requested to pay said principal and interest, they have failed and refused to pay the same or any part thereof and the whole of said principal sum and interest is due, owing and unpaid.

XXIII.

The Court finds that each and every affirmative allegation set forth in the First Amended Answer of defendant, Glens Falls, are untrue, except as in these findings are expressly found to be true.

XXIV

The Court finds that plaintiff's complaint states a claim upon which relief can be granted and the evidence fully establishes such claim. [490]

XXV.

The Court finds that each and every allegation set forth in the second and separate affirmative defense of the First Amended Answer of defendant, Glens Falls, are untrue except as in these findings are expressly found to be true.

XXVI.

The Court finds that each and every allegation set forth in the third affirmative defense of the

First Amended Answer of defendant, Glens Falls, are untrue except as in these findings expressly found to be true. It is true plaintiffs, after subcontract work was abandoned by Duque & Frazzini on June 8, 1945, completed all work remaining to be done under said subcontract but the completion thereof by plaintiff, as aforesaid, was for the account of said Duque & Frazzini. The Court finds that on the final abandonment of the subcontract work by Duque & Frazzini on June 8, 1945, notice was properly and promptly given to said defendant, Glens Falls, and request therein made of it for full performance by said defendant and said Duque & Frazzini of said subcontract and that any action taken by plaintiff was merely to minimize damages and the Court finds the same to be a fact. The Court further finds that no offer was thereupon or thereafter made by either said Duque & Frazzini or said Glens Falls to so perform, nor did either of them request plaintiff to desist from continuing the completion of said work in order to minimize damages until said defendant, Glens Falls, chose to take over further performance.

XXVII.

The Court finds that each and every allegation set forth in the fourth and separate affirmative defense of the First Amended Answer of defendant, Glens Falls, are untrue, except as in these findings are expressly found to be true. It is true plaintiff carried all the men who performed the subcontract work [491] on its own payroll, named itself as emi-

ployer of the men who performed the subcontract work in all income tax withholding, social security and unemployment insurance returns, Workmen's Compensation and Public and Property liability policies on the work being performed by Duque & Frazzini, but the Court finds, in this respect, that arrangements were made therefor within the subcontract for the benefit of Duque & Frazzini which said benefit inured to defendant, Glens Falls and were not in violation of said subcontract.

XXVIII.

The Court finds that each and every allegation set forth in the fifth and separate affirmative defense of the First Amended Answer of defendant, Glens Falls, are untrue, except as in these findings are expressly found to be true.

XXIX.

The Court finds that each and every allegation set forth in the sixth and separate affirmative defense of the First Amended Answer of defendant, Glens Falls, are untrue, except as in these findings are expressly found to be true. It is true said subcontractor did not commence producing material on or before the 19th day of February, 1945, but did commence operation prior thereto in connection with the installation of their plant necessary for producing material under said subcontract.

The Court finds that while it is true that some payments were made by plaintiff for the account of said Duque & Frazzini for labor, material and

the like, before actual payments were due to the subcontractor, these were merely in the form of bookkeeping entries showing charges and advances made for the benefit of said subcontractor.

XXX.

The Court finds that each and every allegation set forth in the seventh and separate affirmative defense of the First [492] Amended Answer of defendant, Glens Falls, are untrue, except as in these findings are expressly found to be true. The Court finds that any excess payment made by plaintiff over the progress payment, after the abandonment of said subcontract work by Duque & Frazzini on June 8, 1945, or any supervision or direction of production of materials by plaintiff following said abandonment was because of the abandonment of said work and the failure of defendant, Glens Falls to take over the completion thereof as hereinabove specifically found.

XXXI.

The Court finds that each and every allegation set forth in the eighth and separate affirmative defense of the First Amended Answer of defendant, Glens Falls, are untrue, except as in these findings are expressly found to be true.

XXXII.

The Court finds that each and every allegation set forth in the ninth and separate affirmative defense of the First Amended Answer of defendant, Glens Falls, are untrue, except as in these findings are expressly found to be true.

XXXIII.

The Court finds that although defendant, Glens Falls, was fully advised by plaintiff and also through investigations made by its duly authorized representatives, of all payments made by plaintiff and manner of making same and amount thereof for the benefit of said Duque & Frazzini and of the amounts earned under said subcontract, as hereinabove found, and although it was also fully advised of all defaults on the part of said Duque & Frazzini known to said plaintiff, although it was advised of the abandonment of said subcontract by Duque & Frazzini and of the action of plaintiff in completing said subcontract as hereinabove found, defendant, Glens Falls, at no time, advised plaintiff that it, said plaintiff, had no authority or right to do any of said acts [493] or that on account thereof, defendant, Glens Falls intended to or would disavow any liability under said subcontract bond. The Court finds that by reason of the conduct and acts of said defendant, Glens Falls, as hereinabove found, and all of the facts and circumstances as disclosed by the evidence, defendant Glens Falls, the surety, waived its right to plead or assert any alleged failure on the part of plaintiff to comply with any of the condition precedent set forth in said subcontract bond as alleged in its First Amended Answer and the separate and affirmative defenses therein contained.

XXXIX.

The Court finds that for the same reason said defendant waived its right to plead or assert any failure on the part of plaintiff to comply with any of said condition precedent contained in said sub-contract bond as found in said Finding XXXIII, it also is estopped from asserting or pleading any such right as against plaintiff.

Conclusions of Law

As conclusions of law from the foregoing Findings of Fact, the Court concludes:

I.

That plaintiff, Basich Brothers Construction Company, a corporation, is entitled to have and recover of and from the defendant, Glens Falls Indemnity Company, a corporation, the sum of Seventy-nine Thousand Five Hundred Eighty-two and 91/100 Dollars (\$79,582.91), together with interest on \$29,866.39 of said amount at the rate of seven per cent per annum from June 8, 1945, to the date of rendition of judgment herein and interest on \$49,716.52 of said amount at the rate of seven per cent per annum from September 25, 1945, to the date of rendition of judgment [494] herein, together with its costs of suit incurred herein.

Let Judgment be entered accordingly.

Done in Open Court this 7th day of March, 1947.

/s/ LEON R. YANKWICH,

Judge.

Approved as to form as provided in Local Rule 7(a).

[Endorsed]: Filed March 10, 1947. [495]

In the District Court of the United States, Southern
District of California, Central Division

No. Civ. 5021—Y

BASICH BROTHERS CONSTRUCTION COM-
PANY, a corporation,

Plaintiff,

vs.

GLENS FALLS INDEMNITY COMPANY, a
corporation, and ANDREW DUQUE and
CARSON FRAZZINI, co-partners, doing busi-
ness under the name of DUQUE & FRAZZINI,
Defendants.

JUDGMENT

The above entitled action came on regularly for trial in the District Court of the United States, Southern District of California, Central Division, before the Honorable Leon R. Yankwich, Judge presiding, on the 25th day of November, 1946, and thereupon regularly continued for further proceedings which were had on the 4th day and 5th day of February, 1947, Stephen Monteleone, Esq., and Tracy J. Priest, Esq., appearing as attorneys for Basich Brothers Construction Company, a corporation, and John E. McCall, Esq., appearing as attorney for the defendant, Glens Falls Indemnity Company, a corporation; (defendants Andrew Duque and Carson Frazzini, co-partners, doing

business under the name of Duque & Frazzini, not having been served with summons and not having appeared, the trial proceeded against the defendant, Glens Falls Indemnity Company, a corporation, alone.)

A jury trial having been duly waived by the respective parties, the cause was tried before the Court without a jury, whereupon, evidence, both oral and documentary, was introduced by and on behalf of said plaintiff Basich Brothers Construction Company, a corporation, and said defendant, Glens Falls Indemnity Company, a corporation, respectively, being fully advised in the premises, the Court having made, signed and filed herein Decision and Order for Judgment and Findings and also its Findings of Fact and Conclusions of Law:

Now, Therefore, It Is Ordered, Adjudged and Decreed that plaintiff herein, Basich Brothers Construction Company, a corporation, have and recover of and from defendant herein, Glens Falls Indemnity Company, a corporation, the sum of Seventy-nine Thousand Five Hundred Eighty-two and 91/100 Dollars (\$79,582.91), together with interest on \$29,866.39 of said principal amount from June 8, 1945, and interest on \$49,716.52 of said principal amount from September 25, 1945, to and including February 28, 1947, said interest amounting in the

sum of \$8557.49, together with plaintiff's costs of suit herein incurred in the sum of \$216.80.

Done in Open Court this 7th day of March, 1947.

LEON R. YANKWICH,
Judge.

Approved as to form as provided in Local Rule 7(a).

Judgment entered March 10, 1947. Docketed March 10, 1947, C. O. Book 42, Page 115.

EDMUND L. SMITH, Clerk,
By /s/ E. N. FRANKENBERGER,
Deputy. [497]

Memorandum of Amount of Interest on of After
March 1, 1947, until rendition of Judgment

The daily interest on the total principal of the Judgment in the amount of \$79,582.91 is \$15.26 a day. [498]

Received copy of the within Judgment this 27th day of February, 1947, at one o'clock p.m.

/s/ JOHN E. McCALL,
Attorney for Defendant
Glens Falls Indemnity
Company.

[Endorsed]: Filed March 10, 1947. [499]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To Edmund L. Smith, Clerk of Said Court, to
the Plaintiff Above Named, and to Stephen
Monteleone, Esq., and Tracy J. Priest, Esq.,
Its Attorneys:

Notice Is Hereby Given that defendant Glens
Falls Indemnity Company, a corporation, hereby
appeals to the Circuit Court [500] of Appeals for
the Ninth Circuit from the final judgment entered
in this action in Civil Order Book 42 at Page 115,
on the 10th day of March, 1947, and from the whole
thereof.

Dated this the 15th day of May, 1947.

/s/ JOHN E. McCALL,

Attorney for Appellant and Defendant Glens Falls
Indemnity Company, a corporation.

[Endorsed]: Filed and mailed copy to Stephen
Monteleone, Attorney for Plaintiff, May 16, 1947.

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH
APPELLANT INTENDS TO RELY

To Edmund L. Smith, Clerk of Said Court, to
the Plaintiff Above Named, and to Stephen
Monteleone, Esq., and Tracy Priest, Esq., Its
Attorneys:

Appellant Glens Falls Indemnity Company, a corporation, one of the defendants above named, intends to rely in its appeal from the whole of the final judgment given, made and entered in the above-entitled action, upon the following points:

1. The trial court erred in finding that appellee complied with all the conditions precedent contained in the bond.

2. The trial court erred in finding that appellee gave to appellant notice of default on the part of the subcontractor, in the manner and within the time required by the terms of the bond.

3. The trial court erred in finding that the subcontractor commenced work as required in the subcontract.

4. The trial court erred in finding that appellee's letter of April 5, 1945, constituted notice of default as required by the terms of the bond.

5. The trial court erred in finding that appellee complied with the condition precedent of the bond that appellant have the right within thirty days after receipt of notice, to proceed or procure others to proceed with the performance of the subcontract.

6. The trial court erred in finding that the completion of the subcontract work by appellee after June 8, 1945, was merely to minimize damages.

7. The trial court erred in finding that appellee has performed every act on its part to be performed under the terms of the subcontract.

8. The trial court erred in finding that appellee retained the last payment payable and all reserves and deferred payments retainable under the terms of the subcontract.

9. The trial court erred in finding that appellee did not conceal from appellant the fact that the subcontractor was in default at the time the bond was accepted.

10. The trial court erred in finding that the subcontract was not altered without the knowledge and consent of appellant. [503]

11. The trial court erred in finding that appellee did not pay to or for the account of the subcontractor in excess of ninety per cent of engineers estimate and ninety per cent of useable materials in stockpile.

12. The trial court erred in finding that appellee did not pay to or for the account of the subcontractor sums in excess of the amount due under the subcontract.

13. The trial court erred in finding that appellee did not take over and control and supervise the subcontract work.

14. The trial court erred in finding that the payments made by appellee were in accordance with provisions of the subcontract.

15. The trial court erred in finding that the carrying by appellee on its own employee rolls and naming itself as employer of the men who performed the subcontract work was within the terms of the subcontract.

16. The trial court erred in finding that appellee did not make premature payments to or for the account of the subcontractor.

17. The trial court erred in finding that appellee did not make payments to the subcontractor on account of the subcontract work before any payment was due under the terms of the subcontract.

18. The trial court erred in finding that payments made by appellee for the account of the subcontractor, before actual payments were due, were merely bookkeeping entries.

19. The trial court erred in finding that the payments made by appellee to or for the account of the subcontractor inured to the benefit of appellant.

20. The trial court erred in finding that appellee did not waive any of its rights, nor elect to perform, nor perform any act inconsistent with the conditions of the bond. [504]

21. The trial court erred in finding that appellant waived compliance by appellee with conditions precedent in the bond.

22. The trial court erred in finding that appellant had knowledge of the manner or amount of payments made by appellee.

23. The trial court erred in finding that appellant was fully advised of all defaults on the part of the subcontractor known to appellee.

24. The trial court erred in finding that the representative of appellant had access to or ex-

amined appellee's payrolls and books during the period payments were being made to or for the account of the subcontractor.

25. The trial court erred in finding that appellant is estopped from asserting the failure of appellee to perform the conditions precedent contained in the bond.

26. The trial court erred in finding that the conduct of appellant lulled appellee into a feeling of security.

27. The trial court erred in finding that the complaint states a claim upon which relief can be granted.

28. The trial court erred in finding that the evidence establishes a claim upon which relief can be granted.

29. The trial court erred in finding that the bond, by the terms thereof, bound appellant for the faithful performance of the work to be done under the terms of the subcontract, Plaintiff's Exhibit "1".

30. The trial court erred in finding that the provisions of the subcontract constitute obligations of appellant.

31. The trial court erred in finding that it was the intention of the parties that the provisions of the subcontract were obligations of appellant. [505]

32. The trial court erred in finding that the subcontractor certified to weekly payrolls paid by appellee.

33. The trial court erred in finding that all of the items set forth in the bill of particulars as amended and corrected, were used in the performance of the subcontract.

34. The trial court erred in finding that the amounts set forth in the bill of particulars as amended and corrected, were reasonable and fair.

35. The trial court erred in finding that the amounts set forth in the bill of particulars as amended and corrected, represents the actual cost to appellee of completing the subcontract work after June 8, 1945.

36. The trial court erred in finding that appellant was indebted to appellee on June 8, 1945.

37. The trial court erred in finding that appellant is indebted to appellee for money expended after June 8, 1945, on account of any default on the part of the subcontractor.

38. The trial court erred in finding that appellant is indebted to appellee for interest prior to date of judgment.

39. The trial court erred in concluding that appellee is entitled to judgment against appellant.

40. The trial court erred in concluding that appellee is entitled to judgment against appellant for interest.

41. The evidence does not support or sustain the findings of fact and conclusions of law as aforesaid.

42. The trial court erred in decreeing that appellee is entitled to judgment against appellant.

43. The trial court erred in decreeing that appellee is entitled to judgment against appellant for interest.

44. The trial court erred in permitting witness George J. Popovich to testify from a summary of purported documents not in court and available to counsel for cross-examination. [506]

45. The trial court erred in permitting witness George J. Popovich to testify from a summary of purported documents not shown to be admissible in evidence.

JOHN E. McCALL,

Attorney for Appellant and Defendant Glens Falls
Indemnity Company, a Corporation.

Service of a copy of the foregoing Statement of Points on Which Appellant Intends to Rely acknowledged this 15th day of May, 1947.

STEPHEN MONTELEONE,

Attorneys for Plaintiff and
Appellee.

[Endorsed]: Filed May 16, 1947. [507]

[Title of District Court and Cause.]

STIPULATION AND ORDER

It Is Hereby Stipulated by and between the plaintiff and appellee Basich Brothers Construction Company, a corporation, and defendant and appellant Glens Falls Indemnity Company, a corporation, in the above-entitled action, by and through their respective attorneys of record, that the origi-

nal exhibits in the above-entitled [508] action may be transmitted to the Circuit Court of Appeals for the Ninth Circuit for use in printing the record on appeal, in lieu of copies.

Dated this 8th day of May, 1947.

STEPHEN MONTELEONE,
Attorney for Plaintiff and
Appellee.

JOHN E. McCALL,
Attorney for Appellant and Defendant Glens Falls
Indemnity Company, a Corporation.

It is so ordered this 15th day of May, 1947.

PAUL J. McCORMICK,
U. S. District Judge.

[Endorsed]: Filed May 16, 1947. [509]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 516 contain full, true, and correct copies of Complaint for Recovery of Money and on Bond; Bill of Particulars; Notice to Produce; Request for Admission Under Rule 36; Stipulation filed Sept. 9, 1946; First Amended Answer of Defendant Glens Falls Indemnity Company; Amendments to Bill of Particulars; Stipulation (unsigned by counsel for plaintiff) filed Octo-

ber 14, 1946; Copy of Letter dated October 8, 1946, to Mr. Stephen Monteleone from J. E. McCall; Memorandum filed October 14, 1946; Amendments to Plaintiff's Complaint; Answer of Defendant Glens Falls Indemnity Company to Plaintiff's Complaint as Amended; Memorandum of Defendant Glens Falls Indemnity Company re Plaintiff's Bill of Particulars; Decision and Order for Judgment and Findings; Findings of Fact and Conclusions of Law; Judgment; Notice of Appeal; Statement of Points on Which Appellant Intends to Rely; Stipulation and Order're Exhibits and Designation of Record which, together with copy of reporter's transcripts of hearings on July 8, 1946, October 14, 1946, November 7, 1946, November 25, 1946, February 4, 1947, and February 5, 1947, and Original Plaintiff's Exhibits 1 to 24, inclusive, and Original Defendant's Exhibits A to D, inclusive, transmitted herewith, constitute the transcript of record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$74.50 which sum has been paid to me by appellant.

Witness my hand and the seal of said District Court this 13th day of June, A.D. 1947.

[Seal]

EDMUND L. SMITH,
Clerk.

By THEODORE HOCKE,
Chief Deputy Clerk.

In the District Court of the United States in and
for the Southern District of California, Central Division

Honorable Peirson M. Hall, Judge Presiding.

No. 5021-PH Civil

BASICH BROTHERS CONSTRUCTION COMPANY, a Corporation,

Plaintiff,

vs.

GLENS FALLS INDEMNITY COMPANY, a Corporation, and ANDREW DUQUE and CARSON FRAZZINI, co-partners doing business under the name of DUQUE & FRAZZINI, Defendants.

REPORTER'S TRANSCRIPT OF
PRETRIAL HEARING

Appearances:

For the Plaintiff Stephen Monteleone, Esq., 1049 Petroleum Building, Los Angeles 15, California.

For the Defendant Glens Falls Indemnity Company: John E. McCall, Esq., 458 South Spring Street, Los Angeles 13, California.

Los Angeles, California, July 8, 1946

2:50 o'Clock p.m.

(In chambers.)

The Court: Very well. I have your statement of issues involved. I do not know what more can be settled by a pre-trial conference here. What do you think?

Mr. Monteleone: I don't know what can be settled. The facts are very simple, as a matter of fact.

The Court: Have you exchanged all your exhibits?

Mr. Monteleone: We have. As a matter of fact, we are both using the same exhibits. Practically every one of Mr. McCall's exhibits are the ones that I presented to the Court.

Mr. McCall: No, we never did get those contracts, your Honor. That is one thing that I wanted to bring up here. We gave notice, the file will show, to produce. If your Honor has the bill of particulars there you will notice, on Schedule 6, the last part, page 2, it says: "Insurance includes compensation, public liability, property damage, California unemployment, Federal old age and Federal excise." Those are the documents we have asked for the production of.

When we came up here the last time counsel for the plaintiff suggested that in lieu of bringing those documents here that he would stipulate that they were all carried in the name of the plaintiff as the

employer of these men instead of being carried as the subcontractor's employees. When we got up here the other day I had drawn up a proposed stipulation which counsel for the plaintiff suggested that he take back and show to his client, the plaintiff. He took it back and he showed it evidently and then he refused to sign it.

Mr. Monteleone: No. Let me correct that, Mr. McCall.

I explained to your associate, when he came to the office, that I would stipulate that all of those documents were carried in the name of Basich Brothers Construction Company as the employers. I asked counsel to add to that stipulation a qualification that by so stipulating we do not concede that Basich Brothers were, in fact or in law, the actual employers.

In other words, they were carried as a matter of convenience to save the expense of the subcontractor. That is a customary practice among contractors, to carry their subcontractor's employees under their workmen's compensation.

I am willing to stipulate, and I so stipulate now, that all of those records designated in the stipulation prepared by Mr. McCall indicate Basich Brothers as the employers. However, we want the privilege of explaining to the Court during the trial how it happened that Basich Brothers appears as the employers.

The Court: Do you have the contracts?

Mr. Monteleone: Yes, I have the contract. The contract gives Basich Brothers the right to do that.

The Court: What you are asking for is the contract, isn't that so?

Mr. McCall: That is right.

Mr. Monteleone: You have the contract.

Mr. McCall: The contracts of insurance?

The Court: Yes.

Mr. McCall: Compensation, and so forth. That is what we wanted produced so that we can introduce it here in evidence.

Mr. Monteleone: It will be produced. I didn't know that. I thought you merely wanted—I will stipulate that Basich Brothers appears as the employers in connection with these documents. I will so stipulate now.

Mr. McCall: But there are other matters that counsel wants to put in there which is matters of defense only, and if we are going to go into that stipulation we would be setting aside all the case that we have in connection with that particular point.

The Court: What I understand is that counsel is willing to stipulate that the documents read as they read.

Mr. Monteleone: That is correct.

The Court: Without waiving any right to any defense he might have.

Mr. Monteleone: That is correct, if your Honor please.

Mr. McCall: That is okay. He doesn't need that, of course. Anyone knows that he would not be waiving any right.

Now I have changed that and wrote in here in this shape a request for admission under Rule 36. While counsel is looking that over, that is the same thing exactly except it is just an admission and I don't know how other lawyers would handle it, but I do get the State court and Federal court mixed up if I do not follow the rule on that particular matter.

So if counsel would just acknowledge receipt of the original, I will file it, and then you can have all the time you want to put in your answer, because it has to be filed later on.

Mr. Monteleone: In other words, we can't change the wording of the documents. I do not know if your Honor has read the subcontract or not.

The Court: No, I haven't. I do not read these things until I have to.

Mr. Monteleone: It provides that is the subcontractor does not provide workmen's compensation, public liability, and so forth, then the general contractor has the right to do so and charge the premium against the subcontractor. When the subcontractor failed to procure workmen's compensation, public liability and property damage insurance, under the subcontract, which is a part of

the bond of the defendant, we paid for those different policies and we are charging the subcontractor with the same money under that provision of the contract.

The Court: Do you want to acknowledge receipt of that?

Mr. McCall: I would like to say one thing on that, since counsel has that point before the Court. He is absolutely correct about what the contract says, that if the subcontractor does not pay these items the general contractor can do it and charge it to him and take it out of any money he may owe him. But in this case all the evidence shows that these documents we are asking for that the general contractor was the subcontractor, the general contractor and everything. He carried all the insurance, all the compensation, paid the compensation, and all that.

The Court: That is what your position is?

Mr. McCall: That is right.

The Court: All right. Then those documents will be produced?

Mr. Monteleone: They will be produced in court.

The Court: Will you need them in advance?

Mr. McCall: We certainly do need them in advance to prepare our case.

Mr. Monteleone: All right.

Mr. McCall: If we can get this information back that we have asked for——

Mr. Monteleone: If you want to save time and not encumber the record, I will stipulate that what you set forth in your request for admissions is true.

We admit those. But we want the privilege of explaining it in court.

The Court: Reserving your defense?

Mr. Monteleone: That is correct.

Mr. McCall: That is right.

The Court: You still want to look at the documents, do you?

Mr. McCall: We would like to look at the documents but we don't have to have them now, or in any big hurry.

The Court: When do you have to have them. This case has not been set for trial.

Mr. McCall: No, it hasn't.

Mr. Monteleone: May we go to trial on the 16th of July?

The Court: I am afraid we cannot do that now because next Monday, the 15th, I have a three-judge case set. I do not know how long it is going to take. The parties want to take oral testimony.

Mr. Monteleone: We have this situation: There are a great many cases pending in Arizona involving this same bond, the same subcontract, in which the defendant Glens Falls has been named on a third-party complaint, and we were trying to avoid going to Arizona. We made three trips there already and it is pretty tiring and is quite an expensive proposition. It involves the same issues as is presented in this case here. Now we can't stall those Arizona cases.

The Court: Are they in Federal Court?

Mr. Monteleone: They are in Federal Court.

The Court: In Judge Ling's court?

Mr. Monteleone: Some are in Judge Ling's court and some are in Tucson.

The Court: Judge Ling is here. I thought maybe you could transfer this case to him here, but I do not know whether he can take it or not.

Mr. McCall: We are offering to do anything, just to get this case over, except to pay the \$100,000.

Mr. Monteleone: Why object to going to trial on the 16th of July before Judge Hall then?

The Court: I cannot try it on the 16th. I cannot give you any assurance that I can. I might be able to try it. I do not know what will happen on the three-judge hearing.

Mr. Monteleone: We will go to any court to have this matter determined.

The Court: Judge Ling is the other District Judge designated with me on this hearing, so he will be tied up on that.

Mr. Monteleone: Suppose we hold it open and come up here on the 16th?

The Court: You do not have many witnesses?

Mr. Monteleone: No.

Mr. McCall: That is another point, your Honor. We have had a lot of uphill sledding. The notice sent out by your Honor called for the names and addresses of witnesses and they didn't put in any of the addresses of their witnesses, and we can't find them to take their depositions, and we want some of those depositions.

Mr. Monteleone: What depositions do you want? You have Mr. Basich's deposition. He is the only one. The others are nothing but bookkeepers and accountants who prepared the bill of particulars, aside from Mr. Kovich. Mr. Kovich was Mr.

Basich's superintendent, and all he knows is what Basich knew, and you have Basich's deposition. You took half a day in taking his deposition.

Mr. McCall: Some of the information Mr. Basich gave us makes us know that we must have Mr. Kovich's deposition, and Mr. Popovich's.

Is it Mr. Popovich that drew the subcontract?

Mr. Monteleone: No, Mr. Popovich is the book-keeper.

Mr. McCall: Who drew up the subcontract?

Mr. Monteleone: I don't know.

Mr. McCall: That is what Basich said.

The Court: How are you going to take their depositions before next Tuesday if you should go to trial next Tuesday?

Mr. McCall: We couldn't do it, your Honor. If we go to trial next Tuesday it would take three weeks to take testimony on this bill of particulars. In other words, if we have a little time we can work this out together and we can save a week or two. The case should not take over three or four days to try.

Mr. Monteleone: We went to Tucson to try the issues involved in this matter, we dragged out witnesses up there, and Mr. McCall went there and they raised some technical objection when we were about to go to trial, after we were in Tucson to try these various issues. This was about four or five months ago. The same issues were raised under third-party complaints filed in these actions, and we were before Judge Sames, who was to hear the matter before he retired. We went three days there

and then these objections were made. They were nothing more nor less than mere technical objections, but Judge Sames sustained the objection with the privilege of amending by interlineation, but they were not ready to go to trial because they raised the objection. It has been nearly a year and a half that we have been battling with the insurance company over these claims here. Mr. McCall can't say that he is unprepared.

The Court: He doesn't say he is unprepared, but he says it will save a lot of the Court's time to take depositions.

Mr. Monteleone: What depositions? There are no depositions, your Honor please, except the man who is Basich Brothers' superintendent on the job, and he is going to be a witness here. He is called as a witness and he will testify.

Mr. McCall: Counsel just drove me into making this statement. He says on account of technical objections I raised over there we said we weren't ready for trial. We tried that case. Judgment went against his client.

Mr. Monteleone: Not on the third-party complaint.

Mr. McCall: I am only defending on the third-party complaint and the Court held that the third-party complaint failed to state a cause of action, and on motion of the plaintiff's attorney he granted them leave to amend, and they did amend. I don't think that is a technical objection. We tried the case already.

The Court: That is beside the issue here.

Mr. Monteleone: There is no deposition that he has in mind except Mr. Kovich, who will be a witness and will testify at the trial. He was the superintendent of Basich Brothers on the job. We are anxious to have this matter determined because it involves so many other matters.

Mr. McCall: I would like to illustrate, if I might, one point which shows the fact that we are not prepared, that is, we do not have our case prepared, to save the time of the Court and counsel and expenses and that I have diligently sought for information.

On the 7th of June a letter was addressed to the plaintiff and his attorney in which I asked this question:

“The third paragraph of your letter of May 23rd, 1945, states that said subcontractors did not commence work within the time specified in said contract, but you did not state when the subcontractors did commence work on said contract. We would like to have this information, together with any and all other information you may be able to give us concerning matters which in your opinion amount to a default on the part of said subcontractors. The subcontractors deny that they are in default in any way whatever.”

On the 11th of June I received this statement from the attorney for the plaintiff:

“* * * For the information of yourself and your client we have no direct knowledge when

the work commenced but that Basich Brothers had no reason to believe that Duque & Frazzini had not sufficient workmen and equipment to insure the completion of said work as the contract provided until the early part of April 1945."

Now in taking the deposition—I just bring that out as one illustration—in taking that deposition all that came out clear. Mr. Basich said just exactly when they started work. That is, all the information that I couldn't get there I got from him.

We were talking about these insurance policies. Here are thousands and thousands of dollars paid for insurance. We do not know the insurance company. We have no way of finding that out.

The Court: When can you have those available?

Mr. Monteleone: I will have those available tomorrow.

The Court: All right.

Mr. McCall: Fine. That helps us then.

The Court: On your request, the plaintiff will be ordered——

Mr. Monteleone: You are talking about workmen's compensation?

Mr. McCall: All the insurance policies.

The Court: They will be made available for counsel's inspection at your office tomorrow?

Mr. Monteleone: Yes.

Mr. McCall: That is fine.

Mr. Monteleone: Your Honor will find a letter written to the defendant over a year ago in which they were given the privilege of examining all the

letters at the office of Basich Brothers regardless. That offer was never accepted by them.

The Court: You say you want to take depositions?

Mr. McCall: I would like to take some of those depositions, yes, sir, and one leads to another. I know I want to take the deposition of George Kovich. He was the general superintendent on the job from start to finish. I do not know his present address, however.

The Court: Will you stipulate to his deposition?

Mr. Monteleone: I will stipulate to it.

The Court: When?

Mr. Monteleone: He is in Fresno, and we will have to reach him. We will have him here this week.

The Court: During the week?

Mr. McCall: Any time that I am not in trial.

Mr. Monteleone: How about Friday?

Mr. McCall: Friday the 12th?

Mr. Monteleone: Yes.

Mr. McCall: 2:00 o'clock?

Mr. Monteleone: 2:00 o'clock.

Mr. McCall: Of course you will have to find out if you can reach him.

Mr. Monteleone: We will make the effort to get him.

The Court: All right. That is stipulated to. Deposition at 2:00 o'clock Friday of this week, July 12th.

What other depositions do you want to take?

Mr. McCall: I called Carson Frazzini. He is

the subcontractor. We have no assistance from anybody. We just have to gouge out the information as best we can.

Mr. Monteleone: We have no assistance either, Mr. McCall.

Mr. McCall: So I finally got Mr. Carson Frazzini today in Reno, and he said that he would give us his deposition if we would come to Reno to take it, and Mr. Monteleone has already stated that he will send Mr. Goodman or someone else there to take that deposition in his behalf.

Mr. Monteleone: I will arrange for somebody to take it.

The Court: What other depositions do you want?

Mr. McCall: You have the names there.

The Court: Nick L. Basich, Harold Slonaker, Bart Woolums, Paul Albino, Homer Mitchell, George Kovich, George Popovich, Homer S. Thompson.

Mr. McCall: Popovich, I want to take his deposition, I am quite sure, but I will not know for sure until I finish with Mr. Kovich.

Mr. Monteleone: For your information, Mr. McCall, Popovich is the office manager. Probably you want to know who prepared this subcontract.

Mr. McCall: Yes.

Mr. Monteleone: He undoubtedly prepared the subcontract from a regular form as a clerk does, if your Honor please, and from Basich's testimony we will stipulate that the contract was drafted, that is, the mechanical part was drafted, by Mr. Popovich.

The Court: Do you still want his deposition?

Mr. McCall: I am not sure, your Honor.

Mr. Monteleone: That is a fact. I have already talked to him.

Mr. McCall: Those depositions I would not let hold up my case though.

The Court: Obviously I cannot give you any definite trial date for next week. I am set up now until the last week in September, September 24th.

Mr. Monteleone: That will be fine.

Mr. McCall: September 24th suits me fine, except that I have to be at the State Bar then. I have all of my dates set down through Saturday.

The Court: Then you won't be there?

Mr. McCall: Hardly.

The Court: I will set it for trial on that date, and if you have any depositions that you want to get out of the way, get them out of the way or else by notice sufficient in advance during this month because I will not be here in August.

Mr. McCall: We can stipulate as to all depositions.

The Court: Very well.

Are these issues sufficiently framed here so that there isn't any quarrel about them? I notice you are complaining about the default. Has that been specified sufficiently to put the matter in issue?

Mr. McCall: It was my impression that it had. Now the rule is to the effect that the plaintiff may allege generally, but the answer must state specifically. I have several special defenses there and I take it that the special defenses are a part of the answer, is that not true?

The Court: Yes, that is correct.

Mr. McCall: In other words, because I don't put it in my answer, if I have it in my special defenses, that is all right.

The Court: That is part of the answer, but what I was getting at is the matter of an issue when I come to decide it here. The first thing is whether or not there is a default.

Mr. McCall: That is right.

The Court: And the second thing is when it occurred and what it was.

Mr. McCall: And did they give notice of it.

Mr. Monteleone: Here is a question. I don't know whether it is a matter of pleading or not. Where the default is raised in the answer can we introduce evidence on it. We don't contend that there was any default but in the event that there was we contend that the insurance company waived any requirement of notice because they contend that the default took place. They were notified on April 5th.

The Court: Do you contend that there was a default?

Mr. Monteleone: No, there wasn't. We don't concede that there was, but I say that in the event——

The Court: How are they liable if there is no default?

Mr. Monteleone: How is who liable?

The Court: How is the defendant bonding company liable if there was no default?

Mr. Monteleone: There was a default later on. I mean, what the bonding company claims is when the default took place we had not notified them and the sub-contractor continued with the work until June.

The Court: At which time there was a default?

Mr. Monteleone: Not only a default but an abandonment of the work.

The Court: That is the default upon which you rely?

Mr. Monteleone: That is the default; yes.

The Court: In answer to their question that there was no notice, you claim that they already knew about it?

Mr. Monteleone: We claim that they already knew about it, but they recognized the policy and they permitted us to continue with the understanding that this bond was still a faithful performance bond.

The Court: I just wanted to know if the issue was framed as between the parties.

Mr. McCall: On whose understanding was it that this bond was faithful performance for anything? Whose understanding did you have at that time? We did not know until just then, your Honor, when they claim that there was a default. That is what we have been trying to find out. Now as I understand it, counsel for the plaintiff says they are not claiming that there was any default until the abandonment of the job, which was on or about June 8, 1945. Is that correct?

Mr. Monteleone: The default on the part of the subcontractor?

Mr. McCall: Yes.

Mr. Monteleone: Yes. We have been trying to work out with the bonding company to put in additional equipment to produce sufficient material, at lease where the Government was ready to step in and take the whole job away from the prime contractor. Your Honor hasn't read these letters and the information given in them so that you are not familiar with what transpired for a matter of months before the subcontractor abandoned the work. As a matter of fact, the bonding company representative and Basich Brothers made—how many trips?—three trips to Arizona in the meanwhile.

Mr. McCall: I think you and I went with them every time they went over there.

Mr. Monteleone: No, we didn't.

I don't know whether your Honor understands it or not, but we are not suing for damages which resulted by reason of any delay in the operation. We are not asking that at all. That is what was involved in that Lang Transportation Company case. We are not asking for damages. We are delayed and we could have made a claim for damages. But all we are asking for is the money which was actually paid by Basich Brothers to cover the payroll and equipment and material which was acquired by the subcontractor in performing their subcontract over and above the amount that was earned by the

I was under the impression that you gentlemen would agree either as to the many items in the bill of particulars as to each one or as to each class. I understand that they can be divided into classes at least concerning dates of demand or dates of payment.

Mr. McCall: On that point, may it please the Court, we still have a few exhibits that we would like to hand in, and on the points of the items in the bill of particulars I have written a letter to plaintiff's counsel——

The Court: Have you stipulated or not?

Mr. McCall: No, we have not.

The Court: The matter is off calendar.

Mr. Monteleone: If the Court please, I will concede everything that Mr. McCall has raised.

The Court: I think the great difficulty here is to know just what Mr. McCall is raising.

Mr. Monteleone: I don't know. I have agreed to whatever he has agreed to, and I will stipulate that he may introduce the exhibits he called to my attention.

The Court: Let us reduce the stipulation to writing.

Mr. Monteleone: I am willing to agree to any of these items.

The Court: The matter is off calendar. You gentlemen get some stipulation in writing as to those various amounts.

Mr. Monteleone: It is not due to the fault of plaintiff, and we should not be penalized in connection with the matter.

The Court: I could not try the case anyway, Mr. Monteleone.

Mr. Monteleone: I understand that, if the Court please, but it is apparent that it has been the purpose of the defendant to stall this matter as long as possible because we are in a very serious situation now, confronted with a great many litigations pending, and apparently the defendant assumes that the plaintiff may have to make certain concessions that he otherwise would not if we go to trial. There are just a few little items involving less than \$50 or \$60, that we are willing to discount and throw off from the bill of particulars. The exhibits that Mr. McCall desires to introduce in evidence I will stipulate they may be introduced in evidence.

Mr. McCall: May we introduce those at this time, your Honor?

Mr. Monteleone: I have no objection to that.

The Court: I guess you can.

Mr. McCall: The first exhibit on the part of the defendant here is a contract dated May 3rd——

Mr. Monteleone: You mean a letter.

Mr. McCall: It is a letter.

The Court: A writing. Let us say it is a writing, then nobody will be committed as to whether it is a letter of contract or an agreement.

Mr. McCall: As I call these off shall I hand them to the Clerk?

Have you seen them, Mr. Monteleone?

Mr. Monteleone: Yes, I have seen them. Are they the ones you refer to in the deposition?

Mr. McCall: Yes.

Mr. Monteleone: No objection.

Mr. McCall: Here is one dated May 1st.

Mr. Monteleone: No objection.

Mr. McCall: Then Mr. Monteleone has the recap of the estimates which we would like to put in as a defendant's exhibit.

Mr. Monteleone: No objection.

Mr. McCall: Then the statement of money paid prior to March 7, 1945, a copy of which was left in counsel's office.

Mr. Monteleone: No objection.

Mr. McCall: And the note and letter to the attorney, and the transcript before Judge Harrison. That is already in.

The Court: Do you offer that in evidence in this court?

Mr. McCall: I just want it before the court.

The Court: Do you offer it in evidence?

Mr. Monteleone: We will offer it on behalf of the plaintiff.

The Court: All right. It is in evidence.

What about the exhibits you offered there and withdrew? Do you re-offer them?

Mr. McCall: I did not withdraw these, your Honor.

The Court: They were withdrawn, according to the transcript.

Mr. Monteleone: We will offer them on behalf

of the plaintiff, the same as indicated in the transcript.

The Court: You re-offer them?

Mr. Monteleone: Yes, your Honor.

Mr. McCall: Yes, your Honor. I thought they had already been offered.

The Court: These are admitted in evidence to be serially numbered.

(The documents referred to were received in evidence and marked Plaintiff's Exhibits 1 to 19 inclusive respectively.)

[Plaintiff's Exhibits are set out in full following Reporter's Transcript—See Index for Page Number.]

Mr. McCall: Then we have a stipulation here regarding the insurance policies which is already in evidence but for some reason the stipulation was not left with the reporter.

The Court: File it with the Clerk.

Mr. Monteleone: I think that we agreed at the pretrial to all of these matters, if the Court please.

The Court: File it with the Clerk.

(The document referred to was received in evidence and marked Defendant's Exhibits A, B, C and D.)

[Defendant's Exhibits A, B, C, D, are set out in full following Reporter's Transcript—See Index for Page Number.]

Mr. McCall: Then there were certain insurance policies mentioned in here. This Court at a pretrial hearing made an order in chambers that the

policies be exhibited to me as counsel for the defendant on the next day.

The Court: Are they in evidence?

Mr. McCall: No, they are not. They have never been exhibited to me. I sent my auditor out to look at them, they were to be shown to him, and he asked defendant's counsel, according to his report to me, several times but those policies have never yet been exhibited to the defendants.

Mr. Monteleone: Mr. McCall had an auditor spend about three weeks at the office of the plaintiff at Alhambra, if the Court please. These documents were all exhibited to the auditor, and it merely refers to the matters contained——

The Court: Mr. Monteleone, are the insurance policies material in this case?

Mr. Monteleone: Not at all.

The Court: Do you maintain that they are material?

Mr. McCall: Yes.

The Court: Do you now make a demand on the other side to produce these policies?

Mr. McCall: Yes, I do.

The Court: Do you want the policies?

Mr. McCall: Yes, your Honor.

Mr. Monteleone: They will be offered.

The Court: Do you want to offer them in evidence?

Mr. McCall: Yes.

Mr. Monteleone: They will be produced and offered in evidence, if the Court please.

Mr. McCall: Your Honor, the plaintiff's com-

plaint refers to the prime contract between Basich Brothers Construction Company and the United States Government and it alleges that it is not attached to the complaint because it was too bulky. I would like for the plaintiff to bring in that part of the contract.

The Court: Why cannot he bring it all in?

Mr. Monteleone: If the Court please, Mr. McCall had that in his office last week and he made a copy of whatever portion he desired. It is the only one we have and I would like to keep it.

The Court: How am I to know what is in it?

Mr. Monteleone: We will have it introduced as an exhibit.

The Court: That will be plaintiff's next exhibit in order when it gets here.

Mr. Monteleone: All right.

Mr. McCall: We have requested the Government for a form and to accommodate counsel we will fill that in and stipulate that that is a copy of the part that we want to put in.

The Court: Form of what?

Mr. McCall: We have ordered it from the Government.

The Court: He is going to introduce the prime contract in evidence and produce it in court here.

Mr. McCall: He only has the one copy he says, your Honor, and if he needs it I don't want to work a hardship on him.

Mr. Monteleone: If we have to call on the Court for assistance to make a copy, we can do that later.

The Court: He will produce it and if you want to withdraw it you can put the forms in, or anything else that you like. But I will not know what is in the contract until I see it.

Mr. Monteleone: That will be introduced in evidence.

Mr. McCall: Now, your Honor, I am bound to answer plaintiff's charges that I have not cooperated in connection with the items in the bill of particulars. On October 8th I wrote him a letter in which I pointed out the reason we were not able to stipulate to items in there. Now may I hand this in as an exhibit for the defendant?

The Court: Are you offering that in evidence?

Mr. McCall: Yes, your Honor.

The Court: Do you have any objection?

Mr. Monteleone: No, if the Court please, except I want to explain these various items for the record.

The Court: Are you offering this letter as an exhibit or are you filing it as argument? I did not know lawyers could make evidence as they went along by writing a letter to the other lawyer after the suit had started.

Mr. McCall: It may be argument.

The Court: It will be filed in the records of the case but not as an exhibit.

Mr. Monteleone: May this document be filed as an answering explanation of those items?

The Court: It may be filed.

Mr. McCall: I do not have a copy of his answer.

The Court: You can copy it from the Clerk.

Mr. McCall: The reason of that, your Honor,

is that it will show the Court the way the bill of particulars is built up and that the items are such that counsel cannot possibly stipulate to them. I see no way that they can be determined except by trial, either before the Court or before a master.

The Court: Item by item?

Mr. McCall: Well, we have no proof of the items, your Honor. There was millions of dollars spent at this place.

The Court: Do either of you have any further exhibits or evidence to offer in the case at this time?

Mr. Monteleone: We have none, if the Court please.

Mr. McCall: None.

The Court: The matter will stand submitted, with this proviso, that upon examination of the files and records, when I get to it I may restore it to the calendar for some testimony.

Mr. McCall: It is understood that this evidence heretofore submitted by counsel for the plaintiff and the defendant is on the question of liability only, is that right?

The Court: I do not know what it is on. I did not hear it.

Mr. McCall: It was stipulated between counsel before that we would submit this evidence and then it would be submitted on briefs, and that was the original idea.

The Court: Have you filed your briefs?

Mr. Monteleone: I have, if the Court please.

Mr. McCall: I have not filed a brief, and his

brief is not designated as an opening brief. It is only designated as points and authorities, and I do not think it does his case justice, and I don't want to take the advantage of him. If he wants to denominate that as his opening brief, I shall certainly be glad to file a reply to it.

Mr. Monteleone: I will stand on what I file, if the Court please.

The Court: You do not desire to file any further briefs?

Mr. Monteleone: No, I am satisfied with the brief I have already filed.

Mr. McCall: Then may I file a reply brief?

The Court: How long will you want for your reply brief?

Mr. McCall: I would like to have 30 days.

The Court: I thought you were in a hurry to get this case decided. You can write a brief in 10 days.

Mr. McCall: I think I can.

The Court: You will have 10 days to file a reply brief and the plaintiff will have 5 days thereafter to reply.

Mr. Monteleone: That is sufficient.

The Court: Then after 15 days the matter will stand submitted.

Mr. McCall: On the question of liability?

The Court: I haven't seen it. Whatever you have here will be examined.

I want to suggest this, however, that if it is at all possible to try this lawsuit all at once, it is my

purpose and intention that it shall be tried rather than to determine a portion of it and then have an appeal taken on that to the Circuit Court of Appeals, and then come back and litigate over a bill of particulars which is three or four hundred pages long and involves thousands of items.

In other words, we are duty bound under the rules of civil procedure and under plain principles of justice to dispose of the whole matter as quickly as possible, so I shall examine whatever you have and whatever you have submitted with that idea in mind.

Mr. Monteleone: May I make this suggestion, if the Court please? If there are any items that Mr. McCall desires to check or take exception to and serve me with the various items I would be very glad to go over the matter with him, and if there is any correction we will make the correction. Mr. McCall has had a certified accountant spend weeks to go over these various items and he knows pretty well whether or not there are any objections to be made to the items. If he has any of those objections before the expiration of the 15 days that we have to file our briefs, I will be very glad to take the matter up with him.

Mr. McCall: Now one of those objections that are mentioned in this letter just filed here is the fact that they have charged the subcontractors, which they want to pass on to the surety, for one man working 25½ hours in one day, and the checks show that they paid him.

The Court: Maybe he got triple time for over-time a couple of hours.

Mr. McCall: No, 8 hours was straight time and 17½ hours was overtime. And there are hundreds and hundreds of items similar to that one.

Mr. Monteleone: Mr. McCall just called my attention to only one.

Mr. McCall: We called your attention to three pages of them, none of which he has given any explanation of whatever.

The Court: Have you any more evidence to offer in this case now?

Mr. McCall: That is all.

The Court: The case will stand submitted.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 16th day of October, A.D. 1946.

/s/ AGNAR WAHLBERG,
Official Reporter.

[Endorsed]: Filed May 16, 1947.

[Title of District Court and Cause.]

Before: Honorable Leon R. Yankwich,
Judge Presiding

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

Thursday, November 7, 1946, 10:00 a.m.

The Clerk: Number 5021-Y. Basich Brothers Construction Company v. Glens Falls Indemnity Company, et al.

Mr. Monteleone: Ready for the plaintiff, if the Court please.

Mr. McCall: Ready.

The Court: Gentlemen, I want to explain to you the circumstances under which I came to take over this case. While we do not have a master calendar, ever since I have been on this bench there has been a system of passing cases on from one Judge to another, where, for some reason, one Judge might have more time than the other. As you know, Judge Hall is in charge of the criminal department, and that department requires a Judge's complete attention, so I expressed a willingness to assist him in any matters that he felt needed immediate attention. He chose this case, and, under the rule, transferred it to me, with the consent of the senior Judge. An order was entered to that effect in compliance with the rules, signed by all three of us. He having set aside the submission, it was necessary to call you in to discuss the matter.

Mr. Monteleone: So far as the plaintiff is concerned, we are agreeable that the matter may stand resubmitted before your Honor.

The Court: I understand all the briefs are in. I have not read them. I have just glanced through the files and all the documentary evidence. The evidence is mostly documentary, except certain proceedings that were had on the pre-trial, which have been reported.

Mr. McCall: Yes, your Honor, the briefs are in. Mr. Monteleone, for the plaintiff, filed an opening brief, and we have filed our reply. He filed his closing brief, but in his closing brief—as I was talking to him a minute ago, he raised a question which had not heretofore been raised in any briefs, and that is the question, whether or not the laws of Arizona control over the laws of California.

The Court: Yes, I noticed that he claimed that the rule of modification of contract does not apply. That it is applied more liberally in Arizona than in California. That is known as *strictissimi juris*.

Mr. McCall: I would like an opportunity, may it please the Court, to reply to that question.

The Court: The only briefs I find are the points and authorities of plaintiff. That is way back. There is a late brief. There is a very small brief called: Points and Authorities of Plaintiff in Support of Its Complaint.

Mr. Monteleone: That is correct.

The Court: Then you have the Glens Falls

brief, which is a large brief, and that is denominated: Reply Brief?

Mr. McCall: That is correct.

The Court: Then Mr. Monteleone's closing brief.

Mr. McCall: It is in his closing brief that he raised for the first time the question of the Arizona law; and that is what I would like permission of the Court to reply to.

Mr. Monteleone: I may state in that regard, I have no objection to Mr. McCall replying, but the issue was not raised, and the first time the issue as to the Arizona law was raised was in answer to the contention held by Mr. McCall in his brief that the strict rule of construction adopted in California——

The Court: In other words, there was an issue tendered by Mr. McCall in his brief that there was a modification of the contract, which relieved the surety.

Mr. Monteleone: That is correct.

The Court: To which you replied in a general way that there was no modification; if there was, they knew of it, but by failure to act within two months they waived it, is that correct?

Mr. Monteleone: That is correct.

The Court: I have to familiarize myself with the issues. You gentlemen, in reply to each other's brief, have made it easier; you have picked up the brief, and found the corresponding answer under the same heading and subheading, which is very helpful to a Judge, especially one like myself, who

does not have a law clerk to analyze them, and hand it over to me, because I enjoy that work too much, and do it myself. Is there any question to the sufficiency of the notice by any subcontractors, under the statute; the notice by subcontractors to the surety of any claim under the contract?

Mr. McCall: There is no claim by subcontractors. This is a general contractor.

Mr. Monteleone: If your Honor please, in this matter the basis of the plaintiff's action is to recover for labor and material and supplies furnished the subcontractor.

The Court: In *ex rel Hargis v. Maryland Casualty Co.*, 64 Fed. Supp. 522, it merely involved the sufficiency of the notice, by one furnishing materials to the subcontractor. I don't think that is involved here. There I held that actual notice took the place of any defect in the formal notice; especially where the contractor was a party and received bills addressed jointly to him and the subcontractor, that it was almost a contract for the benefit of a third party. I don't think that is involved. At any rate, it is an interesting problem, and you may want to read the case.

Mr. McCall: I checked that case, your Honor. There is a question—the defendant defends on one point, that the plaintiff, who is a general contractor, did not give prompt notice.

The Court: Let me ask you one other question. I notice a very elaborate bill of particulars, and in looking at the transcript I notice, I think at the pre-trial, some suggestion was made about giving

one amount, and a total disagreement as to the amount actually paid out.

Mr. McCall: Yes, your Honor, the defendant is unable to determine what amount was paid out under the subcontract, and what amount was paid out under the general contract. And our auditor—it wasn't necessary to find the line of demarkation between the two. Mr. Monteleone, is submitting our evidence, which we had agreed on, wound up by stating it is our understanding we are submitting this on the question of liability, and if the Court should find there was no liability on the part of the defendant that would end the case. If the Court should find that there is liability on the part of the defendant then under our former agreement it would be necessary to try the question of the amount of liability, if any. Any suggestions from your Honor I would be glad to have.

The Court: I may say, gentlemen, I have in the past submitted matters in that maner, but the older I get the more satisfied I am that that is an unsatisfactory way, unless the situation is such as we encounter in tax cases, where the only question is liability of the taxpayer, and the amount can readily be computed. For that reason we have adopted a rule from the Tax Court that in all these cases the Court may render judgment for the defendant, the amount of judgment to be computed by the parties. Of course, there it is only a matter of computation. It could be done without taking evidence.

Mr. Monteleone: In this matter, if your Honor pleases, the records of the plaintiff show that the

items set forth in the bill of particulars were monies actually paid for labor or supplies that were furnished to the subcontractor. The defendant had been given an opportunity of having a certified accountant spend three weeks, at least, going over the books and records, and I indicated to Mr. McCall if there were any items that were questioned by his auditor we would be very glad to submit those matters to the Court. But, the amounts were actually paid out on account of the subcontractor, and on no other account. If it is necessary to bring in the auditor who made the entries we will be glad to do so, but I thought after Mr. McCall's auditor had gone over the records and spent so much time, they would accept it, except for a few minor matters that came up in the last hearing before Judge Hall.

The Court: The last hearing before Judge Hall was September or July?

Mr. McCall: There was a hearing in July. The last one was in September.

The Court: July 8th. That is denominated pre-trial hearing.

Mr. Monteleone: We had a pre-trial hearing, and then a later hearing before Judge Harrison. That matter was transferred back to Judge Hall.

The Court: So long as we have time this morning, gentlemen, we may as well discuss it. That was the object in bringing you here, to find exactly how the situation was. Here is the last one, September 30th, before Judge Harrison, and October 4th, before Judge Hall.

Mr. McCall: That is the last time we were in Court, your Honor.

The Court: I notice Judge Hall raised exactly the same question I raised, and I had not seen this record; I merely looked at July.

Mr. Monteleone: What point is that, your Honor?

The Court: That is with regard to the amount.

Mr. McCall: That was raised by Judge Harrison.

The Court: Reading from the transcript of the hearing of October 14, 1946, beginning at the bottom of page 10:

“Mr. McCall: The reason of that, your Honor, is that it will show the Court the way the bill of particulars is built up and that the items are such that counsel cannot possibly stipulate to them. I see no way that they can be determined except by trial, either before the Court or before a master.

“The Court: Item by item?

“Mr. McCall: Well, we have no proof of the items, your Honor. There was millions of dollars spent at this place.

“The Court: Do either of you have any further exhibits or evidence to offer in the case at this time?

“Mr. Monteleone: We have none, if the Court please.

“Mr. McCall: None.

“The Court: The matter will stand submitted, with this proviso, that upon examination of the files and records, when I get to it I may restore it to the calendar for some testimony.

“Mr. McCall: It is understood that this evidence heretofore submitted by counsel for the plaintiff and the defendant is on the question of liability only, is that right?

“The Court: I do not know what it is on. I did not hear it.

“Mr. McCall: It was stipulated between counsel before that we would submit this evidence and then it would be submitted on briefs, and that was the original idea.

“The Court: Have you filed your briefs?

“Mr. Monteleone: I have, if the Court please.

“Mr. McCall: I have not filed a brief, and his brief is not designated as an opening brief. It is only designated as points and authorities, and I do not think it does his case justice, and I don't want to take the advantage of him. If he wants to denominate that as his opening brief, I shall certainly be glad to file a reply to it.

“Mr. Monteleone: I will stand on what I file, if the Court please.

“The Court: You do not desire to file any further briefs?

“Mr. Monteleone: No, I am satisfied with the brief I have already filed.

“Mr. McCall: Then may I file a reply brief?

“The Court: How long will you want for your reply brief?

“Mr. McCall: I would like to have 30 days.

“The Court: I thought you were in a hurry to get this case decided. You can write a brief in 10 days.

“Mr. McCall: I think I can.

“The Court: You will have 10 days to file a reply brief and the plaintiff will have 5 days thereafter to reply.

“Mr. Monteleone: That is sufficient.

“The Court: Then after 15 days the matter will stand submitted.

“Mr. McCall: On the question of liability?

“The Court: I haven’t seen it. Whatever you have here will be examined.

“I want to suggest this, however, that if it is at all possible to try this lawsuit all at once, it is my purpose and intention that it shall be tried rather than to determine a portion of it and then have an appeal taken on that to the Circuit Court of Appeals, and then come back and litigate over a bill of particulars which is three or four hundred pages long and involved thousands of items.

“In other words, we are duty bound under the rules of civil procedure and under plain principles of justice to dispose of the whole matter as quickly as possible, so I shall examine whatever you have and whatever you have submitted with that idea in mind.

“Mr. Monteleone: May I make this suggestion, if the Court please? If there are any items that Mr. McCall desires to check or take exception to and serve me with the various items I would be very glad to go over the matter with him, and if there is any correction we will make the correction. Mr. McCall has had a certified accountant spend weeks to go over these various items and he knows pretty well whether or not there are any objections to be

made to the items. If he has any of those objections before the expiration of the 15 days that we have to file our breifs, I will be very glad to take the matter up with him.

“Mr. McCall: Now one of those objections that are mentioned in this letter just filed here is the fact that they have charged the subcontractors, which they want to pass on to the surety, for one man working 25½ hours in one day, and the checks show that they paid him.

“The Court: Maybe he got triple time for overtime a couple of hours.

“Mr. McCall: No, 8 hours was straight time and 17½ hours was overtime. And there are hundreds and hundreds of items similar to that one.

“Mr. Monteleone: Mr. McCall just called my attention to only one.

“Mr. McCall: We called your attention to three pages of them, none of which he has given any explanation of whatever.

“The Court: Have you any more evidence to offer in this case now?

“Mr. McCall: That is all.

“The Court: The case will stand submitted.”

I would say, Mr. Monteleone, that while the Court did not specifically say that it was submitted on the question of liability it was merely because he had had no occasion to examine the file and briefs and determine it. Mr. McCall made it very plain that it did not submit the matter as to the amounts collected. So that is a matter that will have to be determined in one way or another.

Mr. Monteleone: If your Honor please, we will be very glad to bring the auditor, and bring all the cancelled checks to show what was actually paid out, and to whom payments were made.

The Court: It is against my custom, and Judge Hall intimated it is against his custom, to try to work out the matter in this manner unless the matter is purely a question of accounting that can be taken care of. I don't send lawsuits to a master. I am opposed to masters. I never used a master in my life, in the Superior Court or here, except in an accounting.

When it comes to the question of liability, that is a different question than accounting. There you are confronted with liability, and whether an item is proper and so forth. I am in a better position to determine that, than to have to do it later from a transcript before a master. I remember, in the 77-B proceeding they had in the Rindge estate, I had claims amounting to nearly a million dollars, and counsel asked me if I would not send it to a master. I said no, I would take it myself. It took 11 or 13 days to try it, and I drew only one appeal out of the entire group. I am certain if it had been sent to a master it would have drawn more appeals than that.

In a case like this, it is not determining what the books show. It is what actually was paid, to determine liability.

Mr. Monteleone: That is correct, if your Honor please. The reason I suggested to Mr. McCall, if there was any actual question that the bills were

actually paid, it is a different matter. I don't understand Mr. McCall to raise the question that the bills were actually paid.

The Court: It is not a question of whether they were paid, but whether they were correctly paid.

Mr. Monteleone: He does not raise the question. In other words, we have the payroll of the subcontractor of what was paid in actual wages, and there was equipment rented by the subcontractors, and the rentals were paid. I don't know whether your Honor has read the deposition.

The Court: Not yet. I only got this yesterday morning. I work fast, Mr. Monteleone, but not that fast.

Mr. Monteleone: The amount of rental paid was under O.P.A. regulations, so there is a question as to the reasonableness of it. If your Honor desires to give us a date to prove those items, I would be very glad to bring the auditor and parties in and prove all of those items set forth in the bill of particulars were paid, for labor or rental on equipment used by the subcontractor.

The Court: So long as the matter was submitted to Judge Hall with this understanding I think we had better let it stand as it is, with this understanding also: That I may, if I choose, regardless of which way I decide it, call for additional testimony to be presented on the subject of damages, because there is this situation: Supposing I find no liability, and supposing you are wrong, how are you going to make findings unless you waive findings as to the amount?

Our Circuit Court of Appeals has interpreted the new rules rather strictly. They have required findings on a non-suit, which is unheard of in modern procedure. The idea of a non-suit is that you have no claim; that you have not proven a cause of action. What kind of findings could you make? Negatives ones. So we have to watch constantly as to what they are going to do next.

Therefore, it would not do to decide liability, and then have no testimony in the record one way or the other as to the amount, assuming there was liability. Suppose I had decided against liability; you then took an appeal, you would have to protect your record, and would have to have findings. I would have to make findings as to the amount, unless you waived findings as to that amount. If you do that, you may go up, and I may be wrong, and the case will have to come back.

Mr. Monteleone: I think the Court's suggestion is appropriate. We are agreeable.

The Court: If I knew more about the case I would fix a date now; but so long as there is another brief due I will let the brief come in, I will consider the matter, and will then probably call you in. In a case like this the best way is to leave the matter, as I am doing now, and I will determine whether further proceedings are necessary. Mr. McCall might recede from his position, and be satisfied with a reaudit, or something like that. But certainly, as there is another question being raised, I think we will let it stand as it is. That is, the

matter will stand submitted when the final brief is in.

How much time do you want for your additional brief? Limit it to one point, as to what the law of Arizona is on the subject. Or do you contest whether the law of Arizona governs?

Mr. Monteleone: That is the main point, it seems to me.

Mr. McCall: There was another point that he raised for the first time in his closing brief.

The Court: Under the decision in the famous case of *Erie Railroad v. Tompkins*, in the matter of contracts, the law of the state governs where the contract was made and the contract was performed.

Mr. McCall: That is our position, your Honor. He alleges in the complaint that the surety bond was given to the corporation at its headquarters in Alhambra, and was executed and delivered here, and, if there should be a judgment for the plaintiff in this case it is elementary that it would be paid here. So that is our position. We have that case your Honor just mentioned, and several others on that point we would like to submit.

There is one more question in the plaintiff's closing brief. He also raises the question of waiver, and I don't have the brief with me where he said if the Court should find that he should have pleaded waiver that he asks permission to amend his complaint, and he sets out what he would like to put in his amended complaint. It is our position that that would be stating a new cause of action. We would like to be heard on that point.

The Court: Here is his closing brief. He calls it a reply brief. Of course, gentlemen, you realize this: that under our liberal rules of pleading the Court may find facts in accordance with the record, even without any amendments. The section is very plain on that subject: Rule 15 (b):

“When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues.”

And under that you can change the theory of the entire action.

Mr. McCall: It is my understanding of the law that no testimony can be introduced on waiver unless waiver has been pleaded by plaintiff. Therefore, in my brief I did not cover the question of waiver as I would have covered it, had it been raised. Is it O.K. for me to cover that point briefly in my reply?

The Court: All right. You want to review the question as to whether the Arizona law or the California law covers it. Of course, the obligations of a contract would be covered by the place of performance. The obligation of the surety ordinarily would be governed by the place where the surety's

undertaking was executed, and is to be performed.

Since the famous *Tompkins* case, the Circuit Court of Appeals in a case of mine, *Ostroff v. New York Life*, has held that where the party takes out a life insurance contract, and resides here, and the company has an office, it is a California contract, despite the fact that the contract says that the premiums are due in New York, and also that any benefits are to be paid in New York. They took judicial notice of the fact that all large companies maintain offices here.

I am familiar with the case involving surety. That was one of the cases of our Circuit, where they ruled the other way. That was one of the cases I agreed to try piecemeal. The result was just as I predicted. I held, because the contract said premiums are paid in New York and benefits are paid in New York, regardless of the effect that as an accommodation they are actually payable here, because they have an office in every large city in the country, would make it a New York contract. The non-contestability clause in New York has been interpreted to be within the statute of limitations. Not even fraud can get behind it. But the California courts have held the other way. So just by interpreting one contract rather than another, the entire complexion of a lawsuit is changed, they having held that it is a California contract; and our courts have held that fraud, and making misrepresentations as to help, are grounds for setting aside, they have held that you can try a case on its merits.

Mr. McCall: That is similar to the case we have here.

The Court: It just happened to come to me indirectly. Of course, had they sustained me the lawsuit would have been at an end, but it would have been much better, and would have saved a lot of time had I proceeded to try it.

Mr. McCall: On that point, I think in fairness to Court and counsel, it might be stated that the reason counsel for the plaintiff and I agreed to submit the case, in the first instance, when we reached that conclusion, was because we could not get a trial date, and it might be if this Court would prefer to give us a date we could handle the whole thing at one time.

The Court: I can't say at the present time. I took it with the idea that it could be decided on the record. Of course, Judge Hall has the criminal department. Had he told me this last week my attitude would have been different. As it is, I have filled my calendar on all of the trial dates, and I am to be in San Diego for two weeks in December. At the present time I think it would be just as well to let it stand, because if we reopen it for additional testimony I don't think it should be a lengthy proceeding.

Mr. McCall: That is right. I am happy to submit it on that proposition.

Mr. Monteleone: How much time, Mr. McCall, do you want?

Mr. McCall: I will finish this week. Monday it

will be wound up. If the Court says, I will make it tomorrow.

The Court: There is no such rush. I will have your closing memorandum, limited to two questions only: Whether the issue of waiver is before the Court on the pleadings; and, second, whether the question of modification is governed by the Arizona or California law.

Mr. Monteleone: If your Honor please, I have run into a California case. I don't have it with me now, because I came directly from Pomona to be here this morning. It is a recent Supreme Court decision, and holds that where a special defense is raised in the answer, raising matters which the plaintiff does not concede, that you are not required to allege in your complaint any allegations of estoppel. It did not go to the point of waiver, but was confined to the question of estoppel. In other words, in our complaint we do not concede that we did not give the notice, or there was any default, as contended by defendant. The issue is raised in the pleadings the first time, by the answer.

The Court: You cannot anticipate. Under the present system of pleadings you do not need to deny any new matter.

Mr. Monteleone: The Supreme Court has held we are not required to allege and anticipate in the complaint the question of estoppel, by having a pleading to that effect. It is waived.

The Court: We will let the matter stand for the present. I will give you five days time for a closing memorandum on those two questions.

Mr. McCall: There is one more question here, your Honor. In the pre-trial memorandum, if that is what it is called, of October 14th—I believe it was in Judge Hall's court—that is, the date when we were handing in our exhibits, at my request he ordered that the insurance policies mentioned in Schedule 7 of plaintiff's bill of particulars be brought into the court. He made an order that those insurance policies be brought into court as exhibits. We have never seen those, and counsel for the plaintiff stated at that time, according to the record, that they would be brought in. They were filed, but I checked the record yesterday, and they had not been filed, according to the record. There is one compensation policy, which has been filed, and another one, and it does not refer to this particular job.

The Court: What is that?

Mr. McCall: There was only one compensation policy, which has been filed, complying with the order of the court, and it is dated 1943. It refers to two other jobs. It does not refer to this job, and it does state that there is no subcontractor on the job.

The other insurance policy, may it please the Court, has been brought into court. I suggested that they be brought in, so that the Court could have them before it.

Mr. Monteleone: As far as the compensation policy is concerned, as Mr. McCall has stated, it does not cover this job. It seems the state of Ari-

zona has a procedure in making an order in Phoenix, or wherever the headquarters are, to extend the policy to cover other jobs. That was done in this particular case, although it does not appear in the policy itself. The policy is the existing policy until cancelled, and has recently been cancelled by the state of Arizona. So the policy introduced in evidence is the policy which covers this particular job.

Mr. McCall: Counsel probably is quite correct, that one policy will be used for several jobs, as the jobs are taken in. There is what is called a rider attached to each policy. There is nothing attached to this policy, and it indicates on its face to refer to two other jobs back in 1933 and 1934, and excludes this job.

The Court: I don't know as to what issue that is material.

Mr. McCall: It is our position that for one defense—I believe it is No. 10, that there was never the relationship of obligee and principal between the parties in question, that is between the general contractor and the subcontractor, for the reason that a long time before they got the bond, and unknown to the surety, the general contractor put the alleged subcontractor on a job, took out all of his insurance for him, or rather all of his employees were covered in the policy—all the insurance policies which were held by the general contractor. The subcontractor had no policies. He had no payroll. Every check was written by the general contractor, and every act done from then on indicated that

there was the relation of master and servant, instead of general contractor and subcontractor.

We asked, way back in July, for the privilege of seeing these policies, and finally, when they were not exhibited to us, we sent an auditor out to look over the records, and counsel for the plaintiff made the statement at the last pretrial that these policies were exhibited to the auditor, but he denies that, and says although he asked for them many times, they were not exhibited to him.

It is my contention that whatever these policies show would be material in this case, whether they be for us or against us. As a matter of fact, the policy which has been submitted, which counsel says is the correct one, states, in answer to the question, that there is no subcontractor on the job. That is the reason, your Honor, we would like to have it submitted.

The Court: Can you identify those?

Mr. Monteleone: I have produced the only compensation policy we have, issued by the State of Arizona. Counsel has been given the opportunity to check in Arizona the public records, and if he can find anything else, I have no objection that they be introduced into evidence. We don't have anything, except what I introduced, except there may be public liability policies. All we had we introduced in evidence.

Mr. McCall: May I call the Court's attention to page 2 of Schedule VI, page 2 of the Bill of Particulars, where the plaintiff has listed, "Insurance includes Compensation, Public Liability, Property

Damage, California Unemployment, Federal Old Age and Federal Excise," for which he has, in his Bill of Particulars, charged the defendant \$9,216.51.

Mr. Monteleone: Under the subcontract, if your Honor please, it provides specifically if the subcontractor fails to make these payments, the prime contractor can make the payments and charge them against the subcontractor.

The Court: That is contained in most of the contracts.

Mr. McCall: And in the case counsel refers to, that is why the subcontractor takes out insurance, or it is taken out for him. Then the general contractor pays for his premiums, that is not the case here. We have never been permitted to see the policies for which he is charging us \$9,216.51. He says he does not have them.

The Court: If a definite order has been made, it should be complied with, but it seems to me that those contracts have a bearing only on the particular item, and we have decided to leave the question of the amounts open for the present. Any statements or admissions that may be contained therein that might be used on another issue cannot be determined until they are produced.

Mr. McCall: That's right. If he never produces them we will never have the advantage of them in our defense.

Mr. Monteleone: If your Honor please, again I advise that all I know is that it is the contention of the plaintiff that the policy introduced in evidence

was by an order made in Arizona extended to cover this particular job.

The Court: It is up to you to produce the order made in Arizona which made it applicable to other jobs.

Mr. Monteleone: Do you want the public liability policies?

Mr. McCall: It has been stipulated several times he would bring them in—all of these policies mentioned on page 2 of our Bill of Particulars, for which he seeks to charge us.

The Court: The Bill of Particulars merely sums them up.

Mr. McCall: I might say this: The plaintiff has refused and failed to tell us what the companies are, and the policy numbers of the policies, when they were written, or anything about them.

Mr. Monteleone: Mr. McCall, I have not refused you anything in that respect. You know it to be a fact.

Mr. McCall: May it be stipulated here then that those companies, and the names of them will be brought in, and the policies filed.

The Court: I think we will have to make a change in the form of the order. I will ask the plaintiff to further particularize the items set forth on page 2 of Schedule VI, Insurance, by giving the names of the companies, and that the originals be left with the Clerk, not as exhibits, but be left with the Clerk so counsel may examine them. That will not interfere with your writing your brief, will it?

Mr. McCall: No, it will not. If any questions

come up as a matter of defense, I am sure the Court will consider them.

The Court: As long as I mentioned two companion cases, I will state that my opinion was published in 23 Fed. Sup. 724, dated June 17, 1938. The opinion of the Circuit was rendered on July 21, 1939, and is reported in 104 Fed. 2nd, 986. Judge Wilbur dissented. He felt my interpretation was correct. There was this companion case which follows that, in which there is also a dissent. This case was right after the Erie-Tompkins case said there was no Federal law, and we were trying to find out as to each contract, what kind it was. You can see that our judges of long experience have trouble in agreeing whether a contract is covered by one law or another.

The matter will stand submitted, and I will leave the other matter open, and when I reach a conclusion as to the legal questions involved I will either give you written notice, or call you up and tell you what conclusion I have reached. If it becomes necessary to take additional testimony, we will fix a time.

The Clerk: There is no objection by counsel to the submission of this case?

Mr. McCall: There is none.

Mr. Monteleone: No objection.

Mr. McCall: There is no otime limit in which to submit the insurance?

The Court: Five days.

Mr. McCall: Five days from my memorandum?

The Court: Five days, running from today.

That is why I asked you if you wanted to see them before you wrote your memorandum?

Mr. Monteleone: It may be I will have a certified of the order from Arizona.

The Court: Do you want 10 days?

Mr. Monteleone: Yes.

The Court: Then it will be 10 days, and they will run simultaneously. Let us have a distinct understanding that I will determine what, if any, additional testimony should be taken, and by whom, on the question of the amount.

Mr. McCall: Yes, your Honor.

Mr. Monteleone: That is agreeable to the plaintiff.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 3rd day of January, A.D. 1947.

HENRY A. DEWING,
Official Reporter.

[Endorsed]: Filed May 16, 1947.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT OF
OF PROCEEDINGS

Los Angeles, California

Monday, November 25, 1946, 2:00 p.m.

Hon. Leon R. Yankwich, Judge Presiding.

The Court: Gentlemen, I have called you here to discuss with you certain matters, some of which relate to the condition of the record. Briefly, I may say that I have had an opportunity to study the voluminous files in the same, including the depositions. I have devoted both the weekend before last and last week to the study of this record.

There are certain things that are not clear, that should be clarified. I presume you are not to blame, because all the stipulations were oral, and entered into in open court; but it is very easy at times to overlook certain particular things, especially when the case goes to one judge, then to another judge, and back to the same judge again. Now it has come to me.

After the case was transferred to me I told you I was not in a position to make any suggestions, because I had not studied the record. I merely had made a cursory examination of the pleadings, to know what it was all about. Since then, as I have said, I have studied the record, studied the depositions, and there are several things which occur to me which should be rectified in the record.

In the first place I find that when the case was returned to Judge Hall, certain documents which

have heretofore been identified in Judge Harrison's court, and as to which an order was drawn, were offered in evidence by both sides. They were sufficiently identified by number. However, the record is not certain; at least I find no indication in writing, that the depositions which are in the file have ever been introduced. As you know, the mere deposition does not in itself make it available as an item of evidence.

We have three depositions in this matter. First, there is a deposition of Mr. Basich, which is a part of the file, attached to volume No. 1, and which was filed June 29, 1946. That deposition was taken on behalf of the defendant, being the deposition of Mr. Nick L. Basich. I gather that counsel, from the arguments they are making and the reference thereto, intended that this should be introduced in evidence, but there is no mark by the Clerk to indicate that any of the three depositions were introduced.

Mr. Monteleone: That was our understanding, if the Court please. Probably it was an oversight on the part of Mr. McCall and myself. So far as the plaintiff is concerned, at this time we offer the deposition of Nick L. Basich in evidence.

Mr. McCall: There is no objection.

The Court: The record shows that Plaintiff's Exhibits 1 to 19, have been received.

The Clerk: There are numbers missing. What numbers are we going to assign to the depositions?

The Court: They are in by reference. There is nothing attached to the Basich deposition. There are some exhibits attached to the other depositions.

That will be No. 20 in evidence. You will find that many of these exhibits are attached to both the complaint and answers, and were received by reference, in that manner. I don't think any copies are missing.

[Plaintiff's Exhibit No. 20 set out in full following Reporter's Transcript—See Index for Page Number.]

Mr. Monteleone: All the copies were introduced in evidence and marked as exhibits before Judge Harrison, if your Honor please.

The Court: Then they were withdrawn and re-introduced before Judge Hall, because Judge Harrison, when he decided not to go on with the case, told you to withdraw your exhibits.

Mr. Monteleone: That is correct.

The Court: You made an argument based on the depositions which are not technically in evidence. I am not trying to be too technical, but they are absolutely necessary for any record you may want to prepare in the case.

The next deposition is a deposition of George W. Kovich, who was a Basich foreman, or superintendent of the job—whatever he called himself.

Mr. Monteleone: At this time, if the Court please, plaintiff offers in evidence the deposition of George W. Kovich, which has already been presented to the Court.

Mr. McCall: No objection.

[Plaintiff's Exhibit No. 21 set out in full following Reporter's Transcript—See Index for Page Number.]

The Court: That was filed August 12, 1946. That will be Plaintiff's Exhibit No. 21. Then we have the deposition of Mr. Bray, the investigator who went down to the job, and made certain observations and certain reports to the defendant Indemnity Company.

Mr. Monteleone: At this time, if the Court please, plaintiff offers in evidence the deposition of John Bray.

Mr. McCall: No objection.

The Court: All right. As to the other exhibits, aside from the prime contract and the insurance policy, they were all in the letter, and, as I have said, I have not completed my study of the case, although I have read all the pleadings in the case, and have made some study of the law.

The Clerk: The deposition of John H. Bray, filed September 30, 1946, is Exhibit No. 22 in evidence.

[Plaintiff's Exhibit No. 22 set out in full following Reporter's Transcript—See Index for Page Number.]

The Court: Then, subject to any further order the Court shall make, it is understood that the matter is submitted by both sides upon the depositions and documentary evidence?

Mr. Monteleone: That is correct.

Mr. McCall: Yes.

The Court: That disposes of that. There is one other matter.

Mr. McCall: Your Honor, we have these in numerical order, and if it will do any good for me

to read them to the Clerk as we introduce them——

The Court: You can identify them for the benefit of the Clerk so you will have a record. My Clerk usually has on the front page a record of the exhibits.

The Clerk: Are these exhibits now in evidence?

Mr. Monteleone: We have stipulated that the exhibits that were introduced before Judge Harrison may be deemed introduced before this court in the same order as they were introduced before Judge Harrison.

The Court: Have you a list of the exhibits?

Mr. McCall: Yes, your Honor.

The Court: Will you hand it to the clerk so that he can reflect the exhibits.

The Clerk: What shall I do when I locate them—physically detach them?

The Court: Certainly. The plaintiff attaches a bunch of letters, and the defendant, to make sure, attaches the same to his answer.

Mr. McCall: Would it help if I would read these out?

The Court: Some of them are duplicates. There is another matter I want to talk to you about.

Mr. McCall: May it please the Court, my associate just called my attention to the fact that these exhibits are listed from 1 to 19 in the transcript of September 30th before Judge Harrison.

The Court: What page?

Mr. McCall: Page 3.

The Court: Here is the transcript of the proceedings before Judge Harrison. You can check

that list against this list. There is just one other matter I think should be specifically covered. At the pre-trial hearing before Judge Hall counsel for the defendants offered a stipulation relating to the manner in which employees of Duque & Frazzini, the subcontractors, were carried on the books, and state their relation to the Liability and Workmen's Compensation Acts. The record shows that the stipulation was not signed, and it was left with the clerk, who evidently filed it at the second hearing. However, there is this statement by Mr. Monteleone—I am reading from page 3, lines 16 to 21:

“I am willing to stipulate, and I do so stipulate now, that all of those records designated in the stipulation prepared by Mr. McCall indicate Basich Brothers as the employers. However, we want the privilege of explaining to the Court during the trial how it happened that Basich Brothers appears as the employers.”

That, of course, leaves the matter absolutely up in the air. It isn't a stipulation of anything, because it is merely a stipulation subject to explanation to be given at the trial. There is no further trial to be had. The only possible hearing to be had will be limited to the question of the expenditures made, and the amounts alleged to have been expended; so this is left up in the air, and should be corrected. The only way it can be corrected is by either stipulating to all these facts, or signing the stipulation which Mr. McCall has offered, and which was filed before Judge Hall on October 14th.

Mr. Monteleon: If your Honor please, when I stated that I wanted the opportunity of explaining—on its face itself it may appear that Basich Brothers were really the employers of these parties. The evidence which the plaintiff proposed to show is that Basich Brothers were accommodating Duque & Frazzini in order to get a rating from the Workmen's Compensation Commission.

The Court: That is what you are alleging; that is what the testimony is?

Mr. Monteleone: That's right. And that Basich Brothers had no control or supervision over any of the employees of Duque and Frazzini.

The Court: That is a conclusion which could not be stipulated to, because it is alleged that they did have control, and it is further alleged that Mr. Kovich saw them at work; that at least on one occasion he countermanded an order; and that from the very beginning they were carried not only on the books, but the indemnity policies and everything else were made to inure to their benefit. That is exactly what I want to find out. As this stands submitted, I will have to determine it on the basis of the testimony of these men, and on the basis of the showing made by stipulation, as to whether there was control or was not control.

Mr. Monteleone: That's the reason I would not want to stipulate, because we take the position that there was no control at any time.

The Court: Then, gentlemen, you have given me a case which simply cannot be decided upon the record. There is no stipulation. They will not

stipulate there was no control, because they are arguing you had a measure of control, which is incompatible with your position. Therefore, I want to know, am I to decide that question on the basis of the record, or am I just going to indulge in an abstract proposition of law? As it is, I have to try the entire lawsuit.

Mr. Monteleone: No, your Honor, we want the privilege of introducing evidence that Basich Brothers had no control whatsoever over the employees of Duque & Frazzini.

The Court: Then, of course, the case is not in a position to be submitted. Judge Hall was asked to take the submission of the case, and being busy thought that all matters that were subject to controversy could be decided on the basis of the record. I have since talked to him. He said he had not made a study of the record. He had no time. He merely took the view that the case was in a position where the Court could decide the question of liability, leaving only the other question, and that is the question of the amount.

How can a Court decide the question of liability when one of the strongest points urged was that there had been a complete modification of the contract; that as a matter of fact there was some joint control in all matters. In reality, although counsel does not use that argument, this was not the relationship of contractor and subcontractor, but to some extent they were engaged in a joint venture where, from the very beginning, they did not wait for them to fail to pay, but from the beginning

began paying wages and everything else, which is not what the contract says. That is the argument being made. How can I decide liability when the question of control is not closed, so far as the evidence is concerned?

Mr. Monteleone: If your Honor please, that is the reason I would not stipulate unless given an opportunity to explain.

The Court: I am not blaming anyone, gentlemen. I am merely pointing out to you what a study of this record has convinced me of, so it is quite evident from these very things that I am not in a position to decide the question of control and the question of the advancement of these monies. As I said, I am not blaming anybody. But I have taken this case over, and these matters occurred to me, which I want to discuss with you. In view of your statement I may as well stop here. But I am not going to stop. I have another suggestion to make, and that is this:

Mr. McCall: Before leaving the point, may I state something? It was my understanding that when all of these documents were resubmitted before Judge Hall counsel said, when I brought this stipulation, which I had signed, but which he had not signed, that he would stipulate to all matters therein contained, or words to that effect.

The Court: No, he did not. He reserved the right——

Mr. McCall: That was in the first case.

The Court: There is no reference to this particular stipulation in the hearing on October 14th.

I have the record in front of me. If you can find it I will be very glad to have you call my attention to it. The record is so voluminous that I will admit that I may have overlooked something, but I am quite sure, if you will examine the entire transcript—it is very short—you will find no reference to that stipulation.

Mr. McCall: I have before me the proposed stipulation, and if it is in order, I would suggest that counsel indicate what he is unable to stipulate to, and that might settle the whole question. I will just read this stipulation, and he can indicate what he is unable to stipulate to, and why.

The Court: That would be negative. He calls for a stipulation, but makes reservations. He wants some evidence to explain how things came about.

Mr. Monteleone: That is correct.

The Court: If that be true the case is not ready for submission, even on the question of liability, because there is evidence which the plaintiff desires to offer to explain how those things came about; and he has a right to do that.

Mr. McCall: Control, I do not think, was mentioned in this stipulation.

The Court: No, control is not mentioned; but the fact that they were carried is made one of the bases of your argument; that if the California law applies, these men modified the contract right from the very beginning. They did not work under this kind of a contract; and you had the right to be informed. You were not informed until April 5th. And even at that time your man Bray, in his testi-

mony, says he looked at the records, but he does not testify he was informed even at that time that these men had been carried on the payrolls. From the very beginning, as the bill of particulars shows, monies were paid out. They did not wait until he was in default on the bond, but paid out monies from the very beginning. On the basis of that argument there was a new relationship. If they offer evidence as to how it came about, there still remains the question for me to decide, whether that arrangement, not having been called to your attention, gives any strength to your argument. I can't decide it now until all the evidence is in.

Mr. McCall: The evidence we offered came from their own witnesses.

The Court: One side can't submit a case; both sides must submit the case. Therefore, if you are not in a position to make this stipulation the Court is not in a position to decide any question of liability.

Mr. Monteleone: I will be willing to stipulate that Basich Brothers exercised no control over the employee of Duque and Frazzini.

Mr. McCall: In view of the testimony of Mr. Basich and the superintendent, Mr. Kovich——

The Court: That is all right. That leaves the one other matter. Now, with this particular matter undecided, it follows, as a matter of course, if the case is reopened it has to be reopened for all purposes. I am satisfied, gentlemen, from a study of the record that this case should be split up as it is. Under the old equity rules it provided that if one

of the issues is such that the decision might decide the case, the Court had a right to try just that issue, and the determination was designated as a final judgment, from which an appeal lay.

I happened to run into that some years ago, and we had a very interesting case, which was not reported, although this point is not covered because everybody agreed that it could be done. That was a case where a foreign woman, the Countess of Santa Cruz sued her father-in-law for a portion of an estate left by some of her husband's forebears. Many questions were involved in that case, and one was the question of whether an ecclesiastical divorce, granted in Spain, had any effect in the matter. We decided—I mean, the lawyers for both sides and myself decided if the will were interpreted in a certain way the other issues would never have to be decided. In other words, if I interpreted the will contrary to the contention of the plaintiff there would be nothing else to try. So it was agreed to submit the matter, I received whatever evidence there was, heard arguments, and decided against the interpretation of the will which the plaintiff placed on it. The case was appealed. I remember one of the newer judges on the Circuit asked how it was possible to try a case piecemeal. His attention was called to the equity rules which allowed this to be done. There is only one section in the Rules of Civil Procedure which deals with the problem, and that is Section 42 (b), which says:

“The Court in furtherance of convenience or to avoid prejudice may order a separate trial

of any claim, cross-claim, counter-claim, or third party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third party claims, or issues.”

I do not know how the Circuit Court will interpret this rule; whether they will say that upon such trial findings shall be made, and that a judgment may be entered, and from that judgment an appeal shall lie, or whether it shall abide by the entire case. Our Circuit Court, for instance, has held that if I grant a non-suit upon the ground that the plaintiff has failed to prove a claim, I have to make findings. I was the victim of that ruling, so it is very plainly impressed upon my memory. So, upon their interpretation, I do not know whether such a ruling, in case I should rule against liability, could be considered final to the extent of warranting the making of findings, and excluding findings as to the amount, and sending the case up to the court. That is the same reasoning that Judge Harrison advanced.

There's one other reason why I think that the case should be reopened and testimony be received, unless you should stipulate as to expenditures made, and that, regardless of the question of liability, that they were properly made, and that they represent the measure of recovery sought in this case. To show you why, aside from these questions of law, it is important that this should be done, I call your attention to the fact that under the defenses made, the amount of monies paid out to and for the benefit

of the subcontractor by the contractor is made the basis for one of the most strongly argued points of the defense, that there was no liability, and that is the question of premature payment. It is conceded that some \$34,000.00 were prematurely paid; that is, that the payments exceeded 90 per cent, that at least \$4,000.00 was paid long before any money was even due.

I am not deciding that point. I want you to bear in mind that I am merely stating some of these things because I have not reached a definite conclusion as to the whole case. I have reached, as any student of the law must, certain conclusions as to legal principles. I shall refer to one of them in a minute, for your own benefit.

Unless it is stipulated that the amounts paid were actually paid on the day they are alleged to have been paid, leaving to me to determine whether they were properly paid, how can I arrive at any conclusion as to whether they constitute a premature payment or not? Of course, if I agreed with Mr. Monteleone, that payments made directly to the material men and labor men are not within the inhibition of these cases which hold that premature payments invalidate the contract—if I agreed with him on that I might let it stand. But my conviction at the present time is that there is no warrant in the law of California or the law of any other state for that position. In other words, I take it that the law of California specifically says that premature payments release the surety, and the best statement of this is contained in a case which is

commented on by both counsel, and that is the case of Pacific Coast Engineering Co. vs. Detroit Fidelity & Surety Co., 214 Cal. 382. Opposing this counsel has cited certain cases to the effect that where an owner of property, because of mechanic's liens makes direct payments to forestall mechanic's liens, that the doctrine of premature payment does not apply. But only one case cited bears such interpretation, and that is the case of Burr vs. Gardella, 53 Cal. Ap. 377. But in that case the Court did not lay down the rule that premature payments could be made. The Court held there that, because the contract, which was a public contract, specifically provided for the immediate payment of claims for labor and materials, that when read together with the other conditions of the bond which provided only for payment by the contractor, if they were not paid, that authorized the making of payments, and the Court said that the payments were not premature because the obligation to pay immediately was just as binding as the other obligation to pay when the other had not been paid. In other words, they were conflicting clauses, and the Court harmonized them in order not to penalize the owner who had paid out. Incidentally, that case was decided in 1921, and the Supreme Court of California in Siegel vs. Hechler, 181 Cal. 187, specifically held that even where the owner is compelled, in order to avoid the liens, to pay money to labor men and material men, he cannot recover to the extent of the premature payments.

Mr. Monteleone: If your Honor please, may I interrupt——

The Court: I am not arguing the case, I am merely telling you why I want this information. This is not an argument at all. I am only indicating why I believe all these documents will have to be set aside and the case set down for trial, for such evidence as you gentlemen desire to introduce. Otherwise, I am not in a position to decide any question in the case. I am indicating to you certain of my reactions to the legal principles I have suggested. Of course, if the case is reopened, and additional evidence introduced, you may argue, after all the evidence is in, both as to the law and as to the facts, without repeating what you have already said in the briefs.

In *Siegel v. Hechler*, 181 Cal., at 191, it is said, to show motivation, even in lien cases, the Courts have held that the premature payments exonerated pro tanto the surety. Quoting from said case:

“Under the law as it stood at the times these contracts were made and the work done, every person furnishing materials or doing work upon the building, whether for a subcontractor or for the general contractor, was entitled to file a lien upon the owner’s property and upon the building therefor, at any time within thirty days after he had ceased to labor or had ceased to furnish materials, and such person could also at any time give a stop notice to the owner and thereby authorize the owner to withhold from

the general contractor upon the principal contract. It appears from the evidence that the bills, aforesaid, were presented to Siegel and that the money was then due from Hechler to the respective claimants for work done or material furnished and used in the building. The answer does not allege, and it is not claimed, that the demands thus made upon Siegel were not then lienable under the law. A stop notice could have been given therefor immediately. Siegal, therefore, immediately incurred a liability, through this default, to have liens filed on the premises for these bills and stop notices given therefor to the owner to withhold money due to Siegel on the main contract. He was liable to be greatly embarrassed by these consequences of such failure on the part of Hechler. Such failure was a violation of Hechler's covenant to save the general contractor "free and harmless" from any and all liability which might accrue against or upon Siegel as the result of any default of Hechler. * * * It was his right, if not his duty, to prevent as much of the damage" as might flow to him.

The Court then held that the payments there were justified under the circumstances, because the lien had accrued, the work had been done, and payment had been requested of him. But here is the rule they state on page 190:

"It is not an accurate statement of the law to say that the surety would be released from

the entire obligation by reason of premature payments. They would not be an alteration of the contract for the performance of which the defendant had become surety. They would be a departure therefrom or a violation thereof, affected by the parties during its performance, without the consent of the surety. The legal result of such departures would not be to release the surety from the entire obligation. The effect would be that Siegel would have no cause of action on the bond to recover from the surety that part of Hechler's defalcation that was made up of these premature payments."

So that the entire basis for this distinction is referable to the right to file a lien, and to the danger to the owner; and the Court, in pursuit of that policy, had sought, wherever possible, to justify premature payments, and if they are made under the mechanic's lien law they are released *pro tanto*, and if they are made otherwise there is a complete relasee, as the other case to which I have referred holds.

Now we are dealing with a contract, on work done for the United States Government, on land owned by the United States Government. Let me read the exact language of the bond:

"This bond is executed for the purpose of complying with the laws of the State of Arizona, and shall inure to the benefit of any and all persons who perform labor of furnish materials to be used in, or furnish appliances,

teams or power contributing to the work described in said contract, so as to give such persons a right of action to recover upon this bond in any suit brought to foreclose the liens provided for by the laws of the State of Arizona, or in a separate suit brought on this bond."

Counsel concedes that is an oversight: that they merely used the wrong form, and that no lien law of the State of Arizona can apply to work done for the Government of the United States.

Mr. Monteleone: Except under the Miller Act.

The Court: This is not an action under the Miller Act.

Mr. Monteleone: I understand: but the prime contractor would be liable.

The Court: I am not talking about what the prime contractor would be liable for, if the contractor were liable over there. This bond, however, does not write in anything that the Government could do under the other contract. It did not, merely because it referred to another contract, of necessity give Mr. Basich the same right the Government has as to him. That does not follow, because the Government under its prime contract has many rights which Mr. Basich does not reserve to him under the contract.

A contract is the measure of liability. The point I am making is this: This bond is not made to cover any mechanic's lien. Then, assuming that on one point the Arizona law applies, and on another, the California law applies—because I presume there is no Arizona law dealing with this topic—then the

reasoning for the exception to the rule does not apply, and if there were premature payments made without knowledge, it raises to question of whether the yare not either released entirely or released pro tanto under the rule of California, I am merely propounding questions. That's why the amounts actually paid became important on the question of liability. You cannot determine liability without the evidence on that subject being in.

There is one matter I want to refer to, and as to that matter I will state the conclusion I have reached, because I feel I should, and it may affect counsel's tactics in the presentation of additional evidence; and that is, that this bond is governed by the law of California and not by the law of Arizona. Ever since *Erie v Tompkins* was decided we have had many difficulties in determining what law governs.

You gentlemen cite the *Ostroff* case. While the *Ostroff* case was reversed, it was reversed merely because a stipulation was entered into that the agent called for the payment of premiums in California, and the benefits in New York, which would make it a New York contract; that the company maintained an office here, at which payments were received, and through which benefits were paid. So on the basis of that admission, which appears in open court, they held it was a New York contract.

I would not take judicial notice of the fact that agencies were established, and what they did, although I know I myself pay insurance in that manner. So it is a common rule of law that a surety

bond is governed by the law of the state in which it is made, unless by the terms of the contract itself it is made to comply with another law. If you eliminate that section, which provides a compliance with the law—because it cannot apply to the Government, because there is no lien against the Government—then the contract was made here, the premium was collected here, and it is performable here. And the general rule applying to a surety bond is that it is governed by the law of the state, and it is performed regardless of what the contract maybe.

It is admitted that the law of California is different from the law of Arizona in this respect: That California law by virtue of the mandate of the Legislature, says a contract of surety or guarantee shall be interpreted in the same manner as any other contract. I think I have given the substance of 2837 of the Civil Code. If there is a failure to comply with the condition precedent, or any changes which alter the complexion of the contract, there is a release of liability.

Arizona has adopted a distinction based upon a premise which is repudiated by our courts, and by most of the courts of the states, and by most of the writers on the subject, because at the present time suretyship is handled by companies organized for that purpose, and a different interpretation should apply.

I have read the four cases which have been cited on the subject, and there is only one that really is very revealing. The others merely the general

proposition. The first is Prescott National Bank v. Head, decided in 1907, 90 Pac. 328. Then follows Lancaster v. Becker, 224 Pac. 810; New York Indemnity Co. v. May, 295 Pac. 314; and the last case cited by counsel Massachusetts Bonding and Insurance Company v. Lentz, 9 Pac. 408.

I have not run down these cases, gentlemen. I have contented myself with the cases you have cited. Of course, when I study a case, when I make notes, I try to supplement the work of counsel, and if I find a case is old, I want to make sure it is still the law. I have not done it in this case. I think, Mr. Monteleone, those are the only cases you have cited from Arizona. If there is one more, I have probably missed it.

Mr. Monteleone: There was only one case. I think that is very important.

The Court: In view of the fact that the case is going to be reopened for the purpose of showing the true relationship between the parties, and answering the proposition of what, if any, measure of control may have been exercised, it is important to note that the Supreme Court of Arizona, in applying these principles, has insisted that modifications are not the basis for exonerating the surety, if they are of such character that the court can say that the essential features and objects of the original contract were maintained. If the changes are of substance even the liberal Arizona law would not release the surety, and this for the very obvious reason which the court gives in the case referred to, Prescott National Bank v. Head, that even a liberal interpreta-

tion will not be allowed if the changes, in effect, make a new contract a substitute for the original contract. This is a paragraph, Mr. Monteleone, that you referred to several times. I think you cite it in full. I will read it.

“Paraphrasing this latter expression of the Supreme Court of the United States, we find in the case before us that the alteration in the manner of fulfilling the construction contract did not in effect make a new contract, or make a substitute for the original contract; that the essential features and the objects of the original contract were maintained; that the parties without any legal constraint upon themselves made modifications in detail, the entire expense of which was immediately borne by the obligee in the surety contract, did not add to the liability of the sureties on the contractor’s bond and did not effect or change the contract price in any manner whatever. Therefore, we conclude that these departures did not operate to discharge the sureties.”

In other words, even the Supreme Court of Arizona, liberal as it is, does not say that you can make a change of a substantial nature in the relationship of the parties and still hold the surety, who has no knowledge of the changes, and was not consulted before they were agreed to by the parties, because I think if that were true the Arizona decision would lead to an absurdity, and would subject to surety company to obligations upon modified con-

ditions which its bond did not underwrite. So that even if I adopt the view that this is an Arizona contract we still have the problem of whether these changes were substantial or not, because if they were, then, of course, the same rule would apply as applied if we consider the contract, as I am inclined to at the present time, a California contract to be governed by California law.

Mr. Monteleone: What changes does your Honor contend were made in the contract that this contract itself does not specify?

The Court: I am not making findings as to what changes were made. I am merely saying that the defendants contend that many changes were made. The defendants contend they advanced money right from the very beginning, before any became due, and payments were made direct by the contractor, the contractor carrying the employees on their payrolls subject to their own indemnity, making contracts for equipment, renting their own equipment, and all this changing the entire complexion of the entire contract, so that the relationship of contractor and subcontractor did not exist; and it was really that of two persons who, for certain purposes, were engaged in a joint venture.

I am not deciding the case. The only conclusion I have reached is that this contract is governed by the California law and not the Arizona law. I have read all the cases you have cited. I cannot for the life of me see that this is an Arizona contract, but I say, even if it is an Arizona contract, then of course the argument is made that there have been

substantial changes; I am talking about changes; I am not talking about notices; so for that reason also the evidence of what was done becomes material; the payments that were made also become material, to determine what, if any, changes were made in the relationship of the parties.

One other reason why I think the case should be reopened unconditionally is this: In the complaint plaintiff alleges that the defendants have been in default ever since the beginning, and at all times thereafter, I will read the allegation, which is Paragraph X:

“That said Duque and Frazzini entered upon the performance of the requirements of their said subcontract with plaintiff, a copy of which is hereto attached and marked ‘Exhibit A’ but failed to prosecute said work therein required of them continuously with sufficient workmen and/or equipment, or to erect two plants each capable of producing 800 cubic yards of suitable material a day.”

Then you allege they failed to do certain things after April 5th. Then in Paragraph XI you allege that after they commenced work they failed and neglected to pay labor.

In other words, it is limited to the entire period. On the basis of allegation of certain facts in the case the defendants allege that they were in default. In your brief you take definitely the position that it was no default until there was an abandonment of the work; an abandonment on the 8th of June.

Mr. Monteleone: I don't think there was a de-

fault. I took the position that there were partial defaults.

The Court: You cite the case of *Union Sugar Company v. Hollister Estate* to this effect, but it does not alter the position. When the first breach occurs it is not the duty of the other side to treat the contract as abandoned. He may not do anything about it, and then rely upon a subsequent breach. That is a general proposition of law; and in the case you cite, in 3 Cal. 2nd 740, the court made that statement merely in order to save the claim from the statute of limitation. In other words, they said that where several breaches occur you are not bound to wait until the first breach. You can wait for the next breach and the next one, then date your claim, so far as the statute of limitations is concerned, from the last breach.

That does not solve the problem here, because counsel say that up to April 5th, when you gave them the first written notice of any difficulties, that several breaches had already occurred, and that you had failed to give them notice. Therefore, it becomes very important that all the evidence relating to what actually took place, if there is any more than is contained in these affidavits of the two men, Kovick and Nick Basich, be gone into, and not leave anything for further discussion.

Another thing: The record is not very clear as to what actually took place on June 8th. Duque & Frazzini have not testified. The testimony is merely that they were notified that he was quitting the job, and they went on and completed the work, but not

until a few days afterward did they notify them, and even then it was not a request to do anything, but merely a general statement, because, in fact, if you were completing the contract on the basis of that, it is alleged that you chose to complete the contract without giving them the first opportunity; that you were under obligations to the Government, but there was nothing in the contract you have which said that you have the right to complete it, and the doctrine of minimizing loss does not mean completing the work. There is no case that warrants that. The doctrine of minimizing loss occurs mostly in torts. When applied in a contract it means merely that a man should protect the property. I have not found any cases you could have cited that hold to the extent that minimizing damage means that you can walk right in and conclude it.

The Government can only do certain things. The Government cannot command. And because the Government had certain rights in the contract with Basich, it does not necessarily follow that Basich had corresponding rights, unless they were stipulated in the contract.

I have tried many of these cases, but I will say frankly that the evidence to my mind is very unsatisfactory. Another thing is this: When you take a case upon the record already made, and no other testimony, you deprive yourself, as a judge, of the some important safeguard, and that is the right to judge the credibility of witnesses, from their demeanor on the stand and the manner in which they answer certain questions. The Circuit

Court has said that when a case is tried upon depositions solely that they are just as good a judge as I am of the inference to be drawn. That is what happens in many admiralty cases. If the evidence were clear you should not hesitate to take the responsibility. But it is not clear.

To sum up, we have three matters: First, here is no definite stipulation as to the relationship of the defendants' employees to the protective insurances which were carried by Basich, other than the general statement that they were carried on the payroll. The circumstances relating to the payroll have not been gone into, and Mr. Monteleone himself is not satisfied with that. If the relationship were that of contractor and subcontractor, dealing at arm's length, why didn't you wait until something became due? Why did you, in advance, pay \$4000.00, when, according to the engineer, they had no money coming at all?

Mr. Monteleone: If your Honor please, the evidence will explain——

The Court: I am just telling you my views on the matter.

Mr. Monteleone: Did your Honor discuss the matter of waiver? We have the question of whether or not the surety waived——

The Court: That is a question of fact to be determined on the evidence. I am not commenting on it, because I do not think that I should express any opinion, even if I had reached a definite conclusion on it. I have not reached a definite conclusion as to whether there was a waiver. Mr. Bray

until a few days afterward did they notify them, and even then it was not a request to do anything, but merely a general statement, because, in fact, if you were completing the contract on the basis of that, it is alleged that you chose to complete the contract without giving them the first opportunity; that you were under obligations to the Government, but there was nothing in the contract you have which said that you have the right to complete it, and the doctrine of minimizing loss does not mean completing the work. There is no case that warrants that. The doctrine of minimizing loss occurs mostly in torts. When applied in a contract it means merely that a man should protect the property. I have not found any cases you could have cited that hold to the extent that minimizing damage means that you can walk right in and conclude it.

The Government can only do certain things. The Government cannot command. And because the Government had certain rights in the contract with Basich, it does not necessarily follow that Basich had corresponding rights, unless they were stipulated in the contract.

I have tried many of these cases, but I will say frankly that the evidence to my mind is very unsatisfactory. Another thing is this: When you take a case upon the record already made, and no other testimony, you deprive yourself, as a judge, of the some important safeguard, and that is the right to judge the credibility of witnesses, from their demeanor on the stand and the manner in which they answer certain questions. The Circuit

Court has said that when a case is tried upon depositions solely that they are just as good a judge as I am of the inference to be drawn. That is what happens in many admiralty cases. If the evidence were clear you should not hesitate to take the responsibility. But it is not clear.

To sum up, we have three matters: First, here is no definite stipulation as to the relationship of the defendants' employees to the protective insurances which were carried by Basich, other than the general statement that they were carried on the payroll. The circumstances relating to the payroll have not been gone into, and Mr. Monteleone himself is not satisfied with that. If the relationship were that of contractor and subcontractor, dealing at arm's length, why didn't you wait until something became due? Why did you, in advance, pay \$4000.00, when, according to the engineer, they had no money coming at all?

Mr. Monteleone: If your Honor please, the evidence will explain——

The Court: I am just telling you my views on the matter.

Mr. Monteleone: Did your Honor discuss the matter of waiver? We have the question of whether or not the surety waived——

The Court: That is a question of fact to be determined on the evidence. I am not commenting on it, because I do not think that I should express any opinion, even if I had reached a definite conclusion on it. I have not reached a definite conclusion as to whether there was a waiver. Mr. Bray

was merely an investigator. He was not an officer; he was not a person who entered into the contract, or modified the contract. He merely was somebody who went there to see something and report; so that is all the evidence there is upon which an alleged waiver is based.

You gentlemen have lived with this case for a long time, while I have had four or five days to work on it. It is a very difficult record. You have briefed it very thoroughly, on both sides. The briefs were started in such a manner that instead of three you have four briefs. So it is a strenuous job on the part of the judge to go over a record like this and form a conception of the case. I am giving you my reactions merely to indicate why I believe that the submission should be set aside, and the case set down for trial. And when it is tried that the whole matter be gone into, so when it is submitted you will have a record with no reservations, which you do not have at the present time, even on the question of liability.

One thing is to be borne in mind, that in what I have said I am not to be understood as indicating any definite opinion as to the case. I have merely indicated one definite opinion as to the law, which I have a right to do, having studied all the law that has been offered on the subject. I have also indicated why certain problems which have been raised have given rise to certain difficulties which I think can only be overcome if the case is reopened and set down for a definite trial; then resubmitted, with such additional oral argument as I shall designate.

You can see why it is always best to have oral argument, because an oral argument brings things out which a brief can never bring out. So I will allow an oral argument later on. Had I known what was going to happen last week, and had I reached the conclusion that the case should be reopened, I could have had you come up last week, and have taken two or three days to finish this additional testimony. But it is hard to tell, when a case begins, how long it is going to last. We had a case which counsel were certain would take three days at least. It took just exactly one day, because we limited the issues in the morning session, and the limitation of testimony resulted in a shorter case, and the case was concluded at five o'clock that afternoon.

I am making this explanation, because when I took the case I understood it was an urgent matter. That was the reason I took it over from Judge Hall. My calendar is in very good shape, but I am leaving this week-end to go to San Diego, and shall be there holding court for three weeks. I cannot therefore give you a date. I probably might have given you a date at the time the case was submitted, but I thought, as Judge Hall thought, that the matter could be decided on the record, and I did not reach the conclusion really until I called you and even then some of the things I call to your attention now were not included in the object of my call. As a matter of fact, the only matter I was going to bring out, had you come here Wednesday or Thursday, being in the midst of a trial, would have taken only a few minutes. I intended merely to indicate

to you that I thought an accounting should be gone into, but the other matters, the deficiencies in the evidence, I did not know about. I had not gone that far, and had not read all the depositions.

Mr. Monteleone: Your Honor enumerated what you wanted, and started with No. 1. I do not know whether you intended to continue.

The Court: I merely have a note to follow. In the first place, on the matter of depositions to be put in, unless you stipulate as to the expenditures and the manner of their making, the entire bill of particulars should be gone into. And, if you are unable to stipulate as to the payroll, the insurance and the like, so far as they bear on the control, those matters will have to be gone into.

Then, as I said, the additional testimony should be brought in to clarify what exactly took place on June 8th. At the present time I believe the testimony is rather unsatisfactory, and as I now take the view, that that was the latter breach, and was not an abandonment, I feel that should be added.

I have spoken to you because some of these things arise from your side. I spoke just as much to Mr. McCall, because he might want, in view of the statement I have made, to bring in other testimony. to produce the members of the firm, or any one representing the subcontractor, to give their version of what took place. He is arguing they prevented him from carrying on, and the evidence, to my mind, is not sufficient to warrant findings one way or the other. It is unsatisfactory. If, after you consider the matter, you desire, without repeating

what you have in the depositions, to bring back some of the same witnesses for either further examination or cross-examination, it can be done.

Mr. Monteleone: What date will your Honor have?

The Court: Gentlemen, I have been setting cases ahead of this case, and I have made other arrangements about San Diego. Although it is not my turn there I am merely going down to help out with the calendar. This month is taken up, and January, with the holidays coming in, I have cases as late as January 21st. I can give you January 28th.

Mr. Monteleone: I have a jury trial, which has been continued twice, if your Honor please, set for January 30, and this may take several days. I was wondering if a few days after the 30th.

The Court: I have no objection. If you want, I will give you a clear week beginning February 4th.

The submission is vacated, and the cause is set for Tuesday, February 4th, for hearing along the lines indicated by the court in its statement, for the completion of the trial.

Mr. McCall: All the records now in will stand as they are?

The Court: Yes, all the depositions are in, and all the exhibits are in. The purpose of reopening is merely for additional testimony along the lines indicated.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 2nd day of January, A. D. 1947.

/s/ HENRY A. DEWING,
Official Reporter.

[Endorsed]: Filed May 16, 1947.

[Title of District Court and Cause.]

Before: Honorable Leon R. Yankwich,
Judge Presiding

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California
February 4, 1947, 10:00 a.m.

Mr. Monteleone: Your Honor, since we had our discussion before the court on the last occasion I proceeded to take the deposition of Carson Frazzini at Reno, Nevada. Mr. McCall was present and I was present, and at this time, if there is no ob-

jection on the part of the defendant, the plaintiff will offer in evidence this deposition of Carson Frazzini, who happens to be a member of Duque & Frazzini, subcontractors.

Mr. McCall: No objection.

The Clerk: How will I mark this?

The Court: As an exhibit.

The Clerk: Does anybody have the number to be given to it?

Mr. McCall: Yes, I have it. The last exhibit for the plaintiff was No. 23.

The Clerk: This will be Plaintiff's Exhibit 24.

Mr. Monteleone: In reading over the deposition, if your Honor please, I notice the reporter undoubtedly made a clerical error. I would like to call the same to the court's attention, and probably Mr. McCall will not object to the correction thereof. On page 27, line 26, and page 49, line 5, instead of "Basich" the name was "Bray." Is that correct, Mr. McCall?

Mr. McCall: Yes, that is correct.

The Court: Where it says Mr. Basich you meant Mr. Bray?

Mr. Monteleone: Yes. On page 58, line 12, it should be "Up to the time you moved your plant away" and on the line following instead of "hen" is should be "men."

The Court: All right.

Mr. Monteleone: On page 76, line 5, the objection by Mr. McCall, which reads: "May it be understood that we object to all of this deposition, which I understand does pertain," instead of that it

should have read "does not pertain." Is that correct, Mr. McCall?

Mr. McCall: That's right.

Mr. Monteleone: The word "not" should be added after "does."

The Court: All right.

Mr. Monteleone: And on page 78, line 9, it should read "Did he ever give any such orders that you know of?" instead of "Did you ever give any such orders that you know of?" Is that correct, Mr. McCall?

Mr. McCall: Apparently.

Mr. Monteleone: And on page 96, line 12, it reads "E. E. Bressi and B. E. Varda." It should be "Bressi and Bevarda."

In connection with the bill of particulars that had been filed by the plaintiff, and the amendment thereto, in reference to the insurance, in checking over some of the exceptions filed by Mr. McCall we had our auditor recheck, and we find a few more errors, which I will ask the court at this time to credit. Schedule I, page 96.

Mr. McCall: Does the court have before him this document I filed with the clerk?

The Court: Yes, I have a copy.

Mr. Monteleone: Schedule I, if the court please, page 96, there is an item listed, Leslie McDaniel, \$6.00, which is a duplication, and should be eliminated.

Mr. McCall: May I ask if counsel has the page of the exceptions to the bill of particulars, on which that appears?

Mr. Monteleone: No; I am just making my own corrections, Mr. McCall.

The Court: That is the last item?

Mr. Monteleone: Yes. On page 97, Rex McCoy, Maintainer Operator, that is a duplication, \$33.75, so that item should be eliminated, so that instead of the total amount as shown on page 2 of the Bill of Particulars, Schedule I, being \$38,979.65, it should be \$38,939.90.

The Court: All right.

Mr. Monteleone: On Schedule II, page 23, Manuel Billareal, there is an error in that amount in the sum of \$6.12. Instead of the total being \$55.56, it should be \$49.44.

On page 2, where the total is shown in Schedule II, instead of being \$8,240.54, it should be corrected to read \$8,234.42.

Schedule IV, page 8, there is an error of an overcharge of \$26.81, which should be deducted from \$44.69, leaving a balance of \$17.88.

Schedule X, page 1, lines 27 and 28 of that page, if your Honor pleases, there are two items, each referring to Dozer 428, showing a total amount of 12½ hours. That should be corrected to 10½ for the total, thereby eliminating from that total the sum of \$20.40.

The Court: Which item is it?

Mr. Monteleone: Dozer 428, lines 27 and 28; the total of those two items is \$124.90, consisting of \$75.00 and \$45.90. Instead of that, the total should be \$104.50. Instead of working 8 hours and

41½ hours, apparently they worked 8 hours and 2½ hours, or 10½ hours.

On Schedule XIX, page 1, Shovel 108, there is an overcharge. What is the date of that overcharge?

Mr. McCall: That is on page 32 of my memo, but I do not have the date.

Mr. Monteleone: There is a duplication, if the court please.

The Court: \$129.04.

Mr. Monteleone: Yes, there is an overcharge of \$26.81.

The Court: Why do you want to make the change?

Mr. Monteleone: It was an overcharge.

Mr. McCall: The date is June 9, 1945.

Mr. Monteleone: Thank you, Mr. McCall.

Schedule XXI, page 1, in checking over the figures throughout, this corresponds with the check made by the defendant. If the court please, there is an overcharge of \$352.47, so that Schedule XXI, in the front should read \$27,477.07 instead of \$27,809.54.

There is one question, if the court please, we ask to make in connection with the amended bill of particulars, covering the items of insurance. That is Schedule VI, as amended. It shows a total amount of public liability and property damage in the sum of \$611.09.

The Court: What schedule is that?

Mr. Monteleone: VI, as amended. There was an amendment filed at your Honor's suggestion, which

segregated the various items of insurance. From February 17, 1945, to June 9, 1945, totaling \$476.26, charged in connection with public liability and property damage. That amount should be eliminated, and the total in property damage and public liability should be \$134.83 instead of \$611.09, as appears on the second page of this amendment.

Mr. McCall: It is dated August 18.

Mr. Monteleone: All items from February 17, 1945, to June 1, 1945, under public liability and property damage, total \$476.26 should be eliminated, as the policy shows these parties were not covered by public liability. \$611.09 should be changed to \$134.83.

Those are the only changes we ask the court to make at this time. Mr. Popovich, will you take the stand?

GEORGE J. POPOVICH

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

A. George J. Popovich.

Direct Examination

By Mr. Monteleone:

Q. Mr. Popovich, your full name is what?

A. George Jovan Popovich.

Q. What is your business or occupation?

A. Contractor.

(Testimony of George J. Popovich.)

Q. With Basich Brothers Construction Company, the plaintiff in this matter? A. Yes.

Q. What is your official capacity?

A. Secretary and office manager.

Q. And the office is located where?

A. 600 South Fremont Avenue, Alhambra.

Q. Were you occupying the same position during the year 1945? A. Yes.

Q. What has been your experience in connection with construction work?

A. I have been engaged in construction work for approximately 11 years.

Q. Did you have any experience as an accountant also?

A. Yes, I have had experience as an accountant, and I also passed the Certified Public Accountant's examination in the State of California.

Q. Have you had duties with other contractors in connection with work of a kind similar to the work involved in this action? A. Yes, sir.

Q. Did you have occasion to meet a member of the firm of Duque & Frazzini? A. Yes.

Q. When did you first meet, and who did you first meet of this firm?

A. Mr. Frazzini, when we commenced to negotiate on our contract.

Q. Can you give us approximately when that was? A. I would have to refer——

Q. The contract is dated February 7, 1945?

A. On or about February 6th.

(Testimony of George J. Popovich.)

Q. Had you known either Duque or Frazzini prior to that time? A. No.

Q. To your knowledge had Duque and Frazzini done any work for Basich Brothers prior to that time? A. No.

Q. Did you discuss the terms of the contract which was to be drawn? A. Yes.

Q. Had you heard from Duque & Frazzini prior to the time the contract was drawn, either by telephone or wire? A. Yes.

Q. How did they contact you?

A. They first called by telephone, and I referred them to Mr. Nick Basich. Then we received several telegrams.

Q. After that they came to your office, is that correct? A. Yes.

Q. While Mr. Frazzini was at your office, before the contract was prepared, did you have any discussion with Mr. Frazzini in reference to a bond?

A. Yes, I asked him whether or not he was financially capable. He said he was. I asked him for the name of his bonding company. He gave me the name, and said to call the bonding company on the phone, which we did.

Q. What name did he give?

A. Glens Falls Indemnity Company.

Q. That was before the contract was signed?

A. Yes.

Q. Did you have a conversation with the Glens Falls Indemnity Company at that time?

A. Yes, we talked to them on the phone, and

(Testimony of George J. Popovich.)

Mr. Frazzini talked to them on the phone. We were told they were financially capable, and a bond would be written in their San Francisco office.

Q. Who told you that?

A. I don't know the name of the individual.

Q. Someone at the Glens Falls, Los Angeles?

A. Yes.

Q. Was anything said as to who was to pay the premium on the bond?

A. Yes, Mr. Frazzini insisted, since we were insisting on a bond we would have to pay the premiums, which we agreed to do.

Q. Did he talk to them, or to a representative, on the telephone?

A. Yes, because they sent an invoice to us from San Francisco for the premium on the bond.

Q. Was a discussion had with Mr. Frazzini at that time with reference to the payroll to be made by Duque & Frazzini in connection with the sub-contract, if one was signed at that time?

A. Yes.

Q. What was said?

A. Mr. Frazzini told us that he had started work at the time, and had worked in Nevada. He was unable to take care of the payrolls because of his money being tied up. He insisted on us carrying the payroll, and paying all of the insurance. That was incorporated in a special provision. Mr. Frazzini stated insofar as all of the bills were concerned, he was able to meet them.

(Testimony of George J. Popovich.)

Q. That was the reason that provision was put in your contract? A. Yes.

Q. You drew the contract, did you not?

A. Yes.

Q. Do you know yourself when Duque & Frazzini first started operations?

A. I don't know.

Q. After the contract was signed, the subcontract, which is introduced in evidence as Plaintiff's Exhibit 1, dated February 7, 1945, was the original of that agreement given to Mr. Frazzini after it was signed? A. Yes.

Q. As I understand, you prepared the subcontract yourself? A. Yes.

Q. Did you arrange any system of keeping account of any of the expenses or any moneys paid out in connection with the transaction between the Basich Brothers Construction Company and Duque & Frazzini, while they were operating?

A. Yes.

Q. Will you state what was the system which you adopted in connection with keeping the account and records for that purpose?

A. In reference to the payrolls, Duque & Frazzini submitted weekly payrolls. We took the weekly payrolls and paid the employees. We also kept separate records pertaining to supplies, consisting of parts and miscellaneous express charges. Those were kept separate in our journal books and those were charged to Duque & Frazzini as accounts receivable. We also kept memorandum records show-

(Testimony of George J. Popovich.)

ing the time the equipment was sent over to Duque & Frazzini's work and the time they were released by Duque & Frazzini to us.

Q. Those were records kept in the ordinary course of business? A. Yes.

Q. In that system you adopted the system usually adopted by contractors in work of that kind? A. Yes.

Q. In reference to the progress of the work by Duque & Frazzini, were any payments made by Basich Brothers directly to Duque & Frazzini during their entire operation? A. No.

Q. Aside from paying the payroll and the insurance, as stated in your contract, were there any payments made direct to Duque & Frazzini instead of having the same charged as a charge against Duque & Frazzini? A. I don't understand.

Mr. Monteleone: Will you read the question?

(Question read by the reporter.)

Mr. Monteleone: I will ask to strike the question.

Q. I notice in the bill of particulars there are certain charges for the rent of equipment from Basich Brothers to Duque & Frazzini?

A. Yes.

Q. Were those merely charges against them for equipment furnished? A. That's right.

Q. The same also as to supplies furnished them?

A. Yes.

Q. Did you arrange for workmen's compensa-

(Testimony of George J. Popovich.)

tion in connection with the Duque & Frazzini work?

A. Yes.

Q. Referring to your bill of particulars, Mr. Popovich, which was introduced in evidence, Schedule I, Payroll—Duque & Frazzini, from February 11, 1945, to June 9, 1945, showing a total of \$38,979.65, subject to the correction made this morning, will you state from what data or information that item was prepared?

A. The items were prepared from weekly payrolls submitted by Duque & Frazzini.

Mr. McCall: That is objected to, as the payrolls themselves would be the best evidence.

The Court: In the Federal Court, if the payrolls are available, a person who had charge of them can summarize.

Mr. Monteleone: We have the originals; if Mr. McCall desires the originals, they are in court.

The Court: So long as the originals are available for inspection, it is not necessary to produce them.

Mr. Monteleone: They have been inspected by the auditor for the defendant on many occasions.

The Court: I will allow you then to refer to this as a summary, it being understood that the originals are present and available to counsel. That is the Federal rule, and has been for many years.

Q. (By Mr. Monteleone): Were those weekly payrolls kept in the ordinary course of your business?

A. Yes.

Q. Were the entries under Schedule I prepared

(Testimony of George J. Popovich.)

by you from original weekly payrolls of Duque & Frazzini?

A. You have reference to Schedule I?

Q. I am referring to Schedule I.

A. This was compiled by Homer Thompson.

Q. Was it under your supervision?

A. It was under my supervision.

Q. Both of you checked the payroll when you prepared the Bill of Particulars? A. Yes.

Q. With respect to the corrections that were made by me this morning, can you state whether or not Schedule I of the Bill of Particulars correctly sets forth each and every item as therein specified, as you incorporated the same from the weekly payroll furnished you by Duque & Frazzini?

A. Yes.

Q. Referring to Schedule II, Payroll, Pioneer Crusher Plant, March 25, 1945, to June 9, 1945, amount \$8,240.54, subject to any corrections that may have been made this morning by myself, will you state to the court from what data or records did you take the items set forth in this particular schedule?

A. They were taken from time cards signed by the employee and approved by Duque & Frazzini's foreman.

Q. Were those time cards kept in the ordinary course of business? A. Yes.

Q. Do the items set forth in Schedule II of the Bill of Particulars correctly set forth all of the items as set forth in the time card?

A. Yes.

(Testimony of George J. Popovich.)

Q. In reference to Payroll, Pioneer Crusher, June 9, 1945, to September 22, 1945, which is under the heading Schedule III of your Bill of Particulars, will you state from what data or records those items were taken?

A. Daily time cards.

Q. And those were time cards made by whom?

A. By the employees and signed by the foreman.

Q. Were they made regularly, every day, in the ordinary course of business?

A. I wasn't on the job at the time that happened. Homer Thompson was office manager.

Q. From your inspection of the daily time cards that purported to be daily time cards, were they kept in the ordinary course of business?

A. Yes, they were.

Q. Considering any exceptions which I may have referred to, which I don't believe I did in this particular matter, this morning, can you state whether or not the items set forth in Schedule III of the Bill of Particulars correctly sets forth each and every item under Payroll, Pioneer Crusher, during the time as indicated, which you had taken from the daily payroll records? A. Yes.

Q. In reference to Schedule IV, P.D.O.C. Crusher, June 3, 1945, to July 7, 1945, in the sum of \$3,250.01, will you state from what records you arrived at the amount of \$3,250.01?

A. From the daily time cards.

Q. From the daily time cards prepared by whom?

(Testimony of George J. Popovich.)

A. The employees and signed by the foreman.

Q. They were turned in to your office after that, is that correct? A. Yes.

Q. These time cards were prepared in the ordinary course of business? A. Yes.

Q. In preparing Schedule IV of your Bill of Particulars, from these daily time cards, does the Bill of Particulars correctly set forth the items as contained in the daily time cards? A. Yes.

Q. Referring to Schedule V Payroll, Hot Plant—Sand, June 9, 1945, to September 22, 1945, in the sum of \$2,888.92, from what records did you arrive at that amount?

A. Daily time cards.

Q. Kept by whom?

A. The employees, and signed by the foreman.

Q. Does your Schedule V of your Bill of Particulars correctly set forth all of the items as you had taken them from the daily time cards?

A. Yes.

Q. Will you explain what was the use of that hot plant at that particular time?

A. Yes, the purpose of the hot plant was to dry out the sand material used in connection with aggregate materials.

Q. Was that sand specified in the subcontract with Duque & Frazzini? A. Yes.

Q. In connection with Schedule VI, Insurance Compensation, \$5,893.60, will you state how that amount was arrived at?

(Testimony of George J. Popovich.)

A. That was arrived from payments made to the Arizona Industrial Accident Commission, and amounts paid to the Pacific Indemnity Company, and amounts paid to the Arizona Unemployment Commission, and amounts paid to the Federal Government for Old Age and Excise Tax.

Q. Taking the compensation, were those figures checked by any representative of the Arizona Compensation Insurance Company?

A. Yes, Mr. Hutchison, the auditor.

Q. Can you state how the rates were determined?

A. The original classification 5506 was submitted to Duque & Frazzini for observation, and later was changed to classification 1710, because of an error made by the Arizona Insurance Commission.

Q. Is this compensation, workmen's compensation, as set forth in the schedule, confined exclusively to the operation of the work called for under the subcontract of Duque & Frazzini?

A. Yes.

Q. Would you state the same thing was true with the other items of insurance? A. Yes.

Q. From the records you have, would you state that the Bill of Particulars, Schedule VI, correctly sets forth the exact item in reference to each of these matters? A. Yes.

Q. Were the amounts actually paid by Basich Brothers Construction Company on account of the various insurance therein specified? A. Yes.

Q. You have Schedule VII, Equipment Rental, fully operated, Basich Brothers Construction Co.,

(Testimony of George J. Popovich.)

February 12, 1945, to May 19, 1945, \$3,989.41. What is understood in the construction business by "Equipment Fully Operated" when you speak of rental?

A. We speak of rental equipment being fully operated—the contractor must take care of all the labor, fuel, maintenance, and everything else that is necessary to operate the machine to work continuously.

Q. Do you mean the contractor, or the one who owned the equipment?

A. The one that owned the equipment.

Q. So you want to correct your statement?

A. Yes, the one who owned the equipment.

Q. The basis of rental is fixed on what?

A. Hourly basis, in accordance with the O.P.A. regulation.

Q. In connection with Schedule VII, total \$3,989.41, where did you get those figures?

A. From the equipment time cards.

Q. Will you state what kind of time cards were prepared, by whom they were prepared, and what did they show?

A. Yes, each employee operating a piece of equipment prepared a time card, showing the classification and type of work being prepared. It was properly signed by him, and also signed by the foreman.

Q. The Schedule VII of your Bill of Particulars correctly sets forth the amount as set forth

(Testimony of George J. Popovich.)

in your time cards, to which you have just referred?

A. Yes.

Q. Was this equipment used solely in connection with the work of Duque & Frazzini?

A. Yes.

Mr. McCall: I object to that as calling for a conclusion.

Q. (By Mr. Monteleone): So far as your records show? A. Yes.

Q. Did you have anything to do with Duque & Frazzini in connection with the rental of this equipment referred to in Schedule VII, you yourself? A. Not under this schedule.

Q. Upon what was the amount of rental based under Schedule VII? What is the basis of it?

A. It is on O.P.A. rental rates.

Q. In connection with Schedule VIII, Equipment Rental not Fully Operated, Basich Brothers Construction Co., March 29, 1945, to June 9, 1945, \$2,773.86—what is commonly understood in the construction business when you speak of rental of equipment not fully operated?

A. The individual renting the equipment must maintain it and furnish all labor and fuel in connection with the operation of the equipment.

Q. If any parts are to be replaced, is that by the party who rents the equipment?

A. Yes, that is, if they are not of a major nature.

Q. How about replacement?

A. Yes, that is to be paid.

(Testimony of George J. Popovich.)

Q. This equipment not fully operated, rented to Duque & Frazzini, and was it used exclusively in connection with Duque & Frazzini's operations?

A. Yes.

Q. From what records did you arrive at the amount of \$2,773.86?

A. From the time card records, equipment records and memorandums made in books of original entry.

Q. Were those records kept in the ordinary course of your business? A. Yes.

Q. From those records does the amount that you indicate in Schedule VIII of your Bill of Particulars correctly set forth the amount of \$2,773.86?

A. Yes.

Q. And upon what was the rental amount charged to Duque & Frazzini based?

A. On O.P.A. rental rates.

Q. In connection with your Schedules VII and VIII, rent of equipment fully operated, and rent of equipment not fully operated, those were equipments that were owned by Basich Brothers, is that correct? A. Yes.

Q. They were rented by Duque & Frazzini, is that correct? A. Yes.

Q. And on your books you made a charge against Duque & Frazzini for rental, is that correct?

A. Yes.

Q. You have Schedule IX, Equipment Rental Royalty Basis, Basich Brothers Construction Co.,

(Testimony of George J. Popovich.)

\$4,191.60. What do you mean by rental, royalty basis?

A. The amount to be paid depends entirely on the amount of materials produced through the plant.

Q. Was this equipment rented fully operated or not?

A. No, it was not rented fully operated.

Q. Upon what record did you arrive at the figure on Schedule IX, \$4,191.60?

A. From books of original entry, engineers' estimates and engineering figures.

Q. Those estimates were made in the regular course of business? A. Yes.

Q. Does the amount, \$4,191.60, set forth correctly the amount shown in those records?

A. Yes.

Q. Was this rental equipment used exclusively in connection with Duque & Frazzini's operations?

A. Yes.

Q. Upon what rental basis did you arrive at the amount?

A. The basis submitted by N. L. Basich to him.

Q. To who? A. Mr. Frazzini.

Q. What was that basis?

A. 10 cents per cubic ton for the Pioneer crusher.

Q. You mean 10 cents per ton? A. Yes.

Q. In your opinion as a contractor, was that amount a reasonable charge?

A. Approximately 50 per cent less than the O.P.A. rental.

(Testimony of George J. Popovich.)

Q. In other words, you charged about 50 per cent less than the O.P.A. rates?

A. Yes.

Q. In your opinion that would be a reasonable charge? A. Yes.

Q. Was this used solely in connection with the operations of Duque & Frazzini? A. Yes.

Q. Would you state that the charges in Schedule No. VII and VIII of your Bill of Particulars were reasonable charges? A. Yes.

Q. In connection with Schedule X, Equipment Rental Fully Operated, P.D.O.C., February 12, 1945, to May 19, 1945, \$6,902.37; Not Fully Operated, May 9, 1945, to June 10, 1945, \$261.34; upon what were those figures based?

A. They were based on O.P.A. rental rates.

Q. Were these equipments used exclusively in connection with Duque & Frazzini's operations?

A. Yes.

Q. It says that the equipment was fully operated, P.D.O.C. What do you mean by that?

A. P.D.O.C. was the name of a contracting company in Tucson, Arizona.

Q. Did they own the equipment?

A. I would not know.

Q. Did you acquire the equipment from them?

A. I would not know that. They had the equipment. We did not know whether they were the legal owners.

Q. How did it happen that you carried that account on your books? Did you make arrangements with Duque & Frazzini? How did you happen

(Testimony of George J. Popovich.)

to show the equipment charged against Duque & Frazzinin directly by Basich Brothers rather than P.D.O.C.?

A. That was taken care of by Mr. N. L. Basich.

Q. From what records did you determine the amount of \$6,902.37 for the equipment fully operated, in Schedule X?

A. From invoices submitted by P.D.O.C., daily time cards, with the proper approval by the foreman.

Q. The account in your schedule correctly sets forth the charges made by P.D.O.C. for fully operated rental, and also for not fully operated rental, as shown by your records?

A. Yes. I would like to make a statement. N. L. Basich, he took care of some of this, but not all of it. That is, our superintendents on the job, that is, Duque & Frazzini's foremen arranged for some of this equipment owned by P.D.O.C.

Q. If Duque & Frazzini wanted a piece of equipment, they asked you folks to get it for them?

A. Yes.

Q. And then you turned the equipment over to Duque & Frazzini?

A. Yes.

Q. The owners would bill you?

A. That's right.

Q. You would then charge the same against Duque & Frazzini?

A. Yes.

Q. Upon what were the rentals in Schedule X based?

A. O.P.A. rental rate.

Q. In your opinion, were those charges reasonable charges?

A. Yes.

(Testimony of George J. Popovich.)

Q. Did you make any greater charges to Duque & Frazzinin for the rental of these items than were made to you by P.D.O.C. A. No.

Q. Were these equipments used exclusively in connection with Duque & Frazzini operation?

A. Yes.

Q. In connection with Schedule XI, Equipment Rental Fully Operated by Basich Brothers, J. G. North & Sons, February 21, 1945, to June 6, 1945, \$4,956.06—upon what records did you arrive at the amounts set forth in Schedule IX?

A. J. G. North & Sons invoices and our books of original entry.

Q. Were those invoices furnished you in the ordinary course of business? A. Yes.

Q. The amounts set forth in the schedule correctly set forth the amount of rental charged by J. G. North & Sons? A. Yes.

Q. Were these equipments used exclusively in connection with Duque & Frazzini operations?

A. Yes.

Q. Will you explain how it happened that the equipments belonging to J. G. North & Sons were turned over to Duque & Frazzini, if you know?

A. I don't know how they were turned over.

Q. In other words, they were used exclusively by Duque & Frazzini? A. Yes.

Q. And J. G. North & Sons charged Basich Brothers, and Basich Brothers in turn billed Duque & Frazzini for this equipment, is that correct?

(Testimony of George J. Popovich.)

A. Yes. J. G. North & Sons were under contract with us, under the prime contract.

Q. The equipment in Schedule XI had nothing to do with your prime contract? A. No.

Q. In other words, it was rented by Duque & Frazzini? A. Yes.

Q. Upon what was the amount based set forth in Schedule XI? A. O.P.A.

Q. Did you make any greater charge against Duque & Frazzini under your Schedule XI than was charged against Basich Brothers by J. G. North & Sons? A. No.

Q. Were any of these equipments used exclusively in connection with the Duque-Frazzini operations as distinguished from any Basich operations? A. Yes.

Q. Would you, in your opinion, state that the amount charged in Schedule XI was the reasonable charge? A. Yes.

Q. In reference to Schedule XII, Equipment Rental Fully Operated, B. B. Bonner 4/6/45 to 4/24/45, \$625.74, will you state from what records you base the items set forth in this schedule.

A. B. B. Bonner's invoices and time cards, equipment rental time cards.

Q. Were those invoices and time cards weekly invoices and time cards? A. Yes.

Q. Prepared in the ordinary course of business.

A. Yes.

Q. The amount of rental was based upon what?

A. O.P.A. rent.

(Testimony of George J. Popovich.)

Q. In your opinion that was a reasonable charge? A. Yes.

Q. Was this equipment, B. B. Bonner, referred to in this schedule, used exclusively in connection with the Duque & Frazzini job? A. Yes.

Q. As I understand, it was turned over to Duque & Frazzini by Basich Brothers, and Baasich Brothers were charged by Bonner, and Basich, in turn, charged Duque & Frazzini, is that right?

A. Yes.

Q. Did you make any greater charges against Duque & Frazzini for the rental of this equipment, than were paid by Basich Brothers to Bonner?

A. No.

(Short recess.)

Q. (By Mr. Monteleone): Referring to Schedule XIII, Equipment Rental Not Fully Operated, Bressi & Bevanda, 4/24/45 to 6/9/45, \$582.72. From what records did you arrive at this amount set forth in Schedule XIII?

A. From the original invoices.

Q. Does this correctly set forth what the invoices set forth? A. Yes.

Q. So far as your records show, this equipment was used in connection with the Duque & Frazzini job? A. Yes.

Q. On what was the amount of \$582.72 based?

A. On the O.P.A. rental rates.

Q. In your opinion was that a reasonable amount? A. Yes.

(Testimony of George J. Popovich.)

Q. Was it a greater charge made to Duque & Frazzini on this equipment than was charged against Basich Brothers? A. No.

Q. Did you have anything to do, so far as that particular equipment was concerned, with it?

A. Yes, Mr. Frazzini occasionally called me at the Los Angeles office, and asked for certain types of equipment, and parts and supplies quite frequently. I accommodated him. I found out what certain equipment was available, and certain parts and supplies were available. At this particular time he asked for a generator. I made my arrangement with Bressi & Bevanda, and a generator was released to us.

Q. Bressi & Bevanda made a charge against you, and you made a charge against Duque & Frazzini, is that correct? A. Yes.

Q. So far as you know, this equipment was not used in any manner in connection with Basich Brothers' operations? A. No.

Q. With reference to the equipment set forth in Schedule XIV, Equipment Rental Not Fully Operated, Industrial Equipment Co., 4/6/45 to 5/8/45, \$176.00—upon what records did you arrive at that amount?

A. Original invoices.

Q. Those were kept in the ordinary course of business? A. Yes.

Q. The same way with the Bressi & Bevanda invoices? A. Yes.

Q. Upon what basis was the rental \$176.00 arrived at? A. O.P.A. rental basis.

(Testimony of George J. Popovich.)

Q. In your opinion was that a reasonable charge? A. Yes.

Q. So far as your records show, this equipment was used exclusively with the Duque & Frazzini job, is that correct? A. Yes.

Q. Was any greater charge made against Duque & Frazzini than was charged by the Industrial Equipment Co. against Basich Brothers?

A. No.

Q. With reference to Schedule XV, Equipment Rental Fully Operated, Basich Brothers Construction Co., June 9, 1945, to September 16, 1945, \$18,485.17—upon what records were the amounts set forth in that schedule arrived at?

A. From books of original entry and equipment time cards.

Q. Were those kept in the ordinary course of business? A. Yes.

Q. Does the amount set forth in Schedule XV correctly set forth the amount as shown by those records? A. Yes.

Q. So far as the record is concerned, were these equipments used exclusively in connection with the work set forth in the subcontract of date February 7, 1945? A. Yes.

Q. Upon what basis was the amount of rental of equipment fully operated? A. O.P.A.

Q. In your opinion was that a reasonable charge? A. Yes.

Q. So far as the records are concerned, were any of these equipments set forth in Schedule XV

(Testimony of George J. Popovich.)

used in connection with any other operation aside from the work specified in the subcontract of date February 7, 1945? A. No.

Q. In reference to Schedule XVI, Basich Brothers Construction Co., Equipment Rental, Not Fully Operated, June 9, 1945, to September 8, 1945, \$2,849.56—upon what record was this amount arrived at?

A. From the books of original entry and the invoices.

Q. Were those records kept in the ordinary course of business? A. Yes.

Q. Upon what basis was the amount of the rental arrived at? A. O.P.A.

Q. In your opinion, was that a reasonable charge? A. Yes.

Q. So far as your records show, was any of the equipment mentioned in Schedule XVI used on any other work outside of the work set forth in the subcontract of date February 7, 1945?

A. No.

Q. Referring to Schedule XVII, Basich Brothers Construction Co., Equipment Rental, Royalty Basis, \$6,753.20, upon what records was that amount based?

A. From the United States Engineers' records and our books of original entry and our entire records.

Q. What was used as the basis of the royalty—what amount?

(Testimony of George J. Popovich.)

A. They used 10 cents per ton on the Pioneer Crusher.

Q. Does this refer to the Pioneer Crusher?

A. Yes, and 10 cents for the hot plant.

Q. In your opinion, was that a reasonable charge? A. Yes.

Q. From your records can you state whether or not any of the equipment referred to in XVII was used in connection with any other work, outside of the work set forth in the subcontract of date February 7, 1945? A. No.

Q. Referring to Schedule XVIII, Equipment Rental Not Fully Operated, P.D.O.C., June 15, 1945, to September 17, 1945, \$108.50, upon what records, if any, do you base this figure?

A. Original invoices.

Q. Were those kept in the ordinary course of your business? A. Yes.

Q. What was the amount based on?

A. O.P.A. rental.

Q. In your opinion was that a reasonable charge? A. Yes.

Q. So far as the records show, can you state whether or not this equipment was used exclusively in connection with the operation called for under the subcontract of September 17, 1945?

A. No.

Q. It was?

A. Was it used exclusively in connection—

Q. —with that work? A. Yes.

Q. Not in connection with any other matter?

A. That's right.

(Testimony of George J. Popovich.)

Q. In reference to Schedule XIX, Equipment Rental Fully operated, P.D.O.C., June 9, 1945, to September 6, 1945, \$10,412.27, will you state upon what records the amounts set forth were based?

A. The original invoices.

Q. Furnished to you by whom?

A. P.D.O.C.

Q. Were the amounts scheduled correctly based upon those invoices? A. Yes.

Q. Upon what basis was the rental fixed in Schedule XIX? A. O.P.A.

Q. In your opinion was that a reasonable rental? A. Yes.

Q. Will you state whether or not the equipment referred to in Schedule XIX were used exclusively in connection with the operation called for in the subcontract of February 7, 1945?

A. Yes.

Q. They were not used in connection with any other operation of Basich Brothers, is that correct?

A. Yes.

Q. With reference to Schedule XX, Equipment Rental, Royalty Basis, P.D.O.C., \$5,349.73, upon what records did you arrive at that figure?

A. Original invoices by P.D.O.C.

Q. Were the invoices furnished by P.D.O.C. in the regular course of business? A. Yes.

Q. Upon what basis was the amount arrived at?

A. O.P.A. rental rates.

Q. In your opinion, was that a reasonable rental?

(Testimony of George J. Popovich.)

A. In this particular rate, I did not have anything to do with it. Mr. N. L. Basich made that deal direct, but we have checked it, and that was in accordance with O.P.A. rental rates.

Q. In your opinion was that a reasonable rate?

A. Yes.

Q. So far as the records concerned show, was that equipment used exclusively in connection with the work set forth in the subcontract of February 7, 1945?

A. Yes.

Q. In reference to the Equipment Rental, Fully Operated, set forth in Schedule XXI, J. G. North & Sons, June 8, 1945, to September 12, 1945, \$27,809.54, will you relate upon what records the figures set forth in this schedule were based?

A. Original invoices sent by J. G. North & Sons.

Q. Those invoices were furnished to Basich Brothers in the regular course of business, is that correct?

A. Yes.

Q. On or about the times the items were incurred?

A. At the end of each month we would receive everything in detail from J. G. North.

Q. Upon what basis was the rental \$27,809.54 made?

A. O.P.A. rentals.

Q. In your opinion was that a reasonable rental?

A. Yes.

Q. Do the items set forth in Schedule XXI correctly set forth the amounts you arrived at from these invoices you have referred to?

A. Yes.

(Testimony of George J. Popovich.)

Q. From your records can you state whether or not the invoices referred to in Schedule XXI were used exclusively for the operations set forth in the subcontract of February 7, 1945? A. Yes.

Q. Were they in any manner connected *with any* operations? A. No.

Q. With reference to Schedule XXII, Equipment Rental Fully Operated, Phoenix Tempe Stone Co., June 15, 1945, to August 9, 1945, \$6,102.05, upon what was that amount based?

A. Original invoices submitted by Phoenix Tempe Stone Co., and from equipment time cards.

Q. And they were kept in the ordinary course of your business? A. Yes.

Q. Does the amount set forth in Schedule XXIV correctly set forth the amount as shown by those invoices and records? A. Yes.

Q. Can you state upon what the amount of \$6,102.05 was based?

A. On O.P.A. rental rates.

Q. In your opinion was that a reasonable charge? A. Yes.

Q. Will you state, from your records, whether or not the equipment was used exclusively in connection with the work set forth in the subcontract of February 7, 1945? A. Yes.

Q. Was any of it used, do your records show, in connection with any other work? A. No.

Q. In reference to Schedule XXIII, Equipment Rental Not Fully Operated, Bressi & Bevanda,

(Testimony of George J. Popovich.)

June 9, 1945, to September 10, 1945, \$1152.61, upon what records did you arrive at that amount?

A. From Bressi & Bevanda original invoices.

Q. Does the amount in Schedule XXIII correctly set forth the amount as shown by those invoices? A. Yes.

Q. Were those invoices kept in the ordinary course of your business? A. Yes.

Q. Upon what was the amount of \$1152.61, set forth in Schedule XXIII, based?

A. O.P.A. rental.

Q. In your opinion was that a reasonable charge? A. Yes.

Q. From your records state whether or not the equipment referred to in Schedule XXIII was used exclusively in connection with the work set forth in the subcontract of February 7, 1945?

A. Yes.

Q. It was not used in connection with any other work at all, is that correct? A. Yes.

Q. That is, it was not so used, is that correct?

A. Yes.

Q. In reference to Schedule XXIV, Equipment Rental, Not Fully Operated, Martin Construction Co., June 15, 1945, to September 8, 1945, \$270.00, upon what was that based?

A. Original invoices.

Q. That were furnished to you by this concern in the ordinary course of business?

A. Yes.

Q. Upon what was the rental based?

A. Based on O.P.A.

(Testimony of George J. Popovich.)

Q. In your opinion was that a reasonable rental?

A. Yes.

Q. From your records can you state whether or not this equipment was used exclusively in connection with the work specified in subcontract of February 7, 1945?

A. Yes.

Q. It was not used in connection with any other work, is that correct?

A. Yes.

Q. In reference to Schedule XXV, Equipment Rental, Not Fully Operated, Axman-Miller Construction Co., July 6, 1945, to September 17, 1945, \$700.00, upon what, if any, records is this amount based?

A. Upon O.P.A. rental rates.

Q. What records did you use in arriving at it?

A. Original invoices.

Q. Sent to you by the Axman-Miller Construction Co.?

A. Yes. I was going to say one thing. On Schedule XXIV, when you told the Judge, you forgot to mention there was a correction made on that particular charge.

Q. In other words, I under, Mr. Popovich, so far as your testimony is concerned, if there were any corrections made by me this morning, that will affect your answer?

A. Yes, but you did not mention this particular one.

Q. I did not? A. No.

Q. What correction do you desire to make in connection with that?

(Testimony of George J. Popovich.)

A. This amount should be reduced. I have the records there. It's a matter of some twenty-odd dollars. Seven days at \$45.00 per month, a total of \$21.00 overcharge.

Q. In other words, there was a \$21.00 overcharge in connection with the amount of \$270.00, is that correct? A. Yes.

Q. The amount should be \$249.00 rather than \$270.00? A. Yes.

Q. Otherwise, your testimony stands as it, is that correct? A. Yes.

Q. We are now referring to Schedule XXV, Equipment Rental, Not Fully Operated, Axman-Miller Construction Co., July 6, 1945, to September 17, 1945, \$700.00. Upon what record is that based?

A. Original invoice.

Q. Kept in the ordinary course of business?

A. Yes.

Q. Upon what was the rental based?

A. O.P.A. rental.

Q. In your opinion was that a reasonable rental?

A. Yes.

Q. From your records will you state whether or not this equipment was used exclusively in connection with the work specified in the subcontract of February 7, 1945? A. Yes.

Q. And not used in connection with any other matter, is that correct? A. Yes.

Q. In reference to Schedule XXVI, Repairs Made by Others on Basich Brothers Construction

(Testimony of George J. Popovich.)

Co. Equipment, Not Fully Operated, \$275.51. Will you state upon what records these were based?

A. On original invoices.

Q. Were they kept in the ordinary course of business? A. Yes.

Q. Does the amount set forth in Schedule XXVI correctly state the amount as shown by those invoices? A. Yes.

Q. What was used as the basis in arriving at the figure \$275.51?

A. The details presented by the George Audish Welding Shop.

Q. Was that based upon any O.P.A. rate, or was that just billed? A. That was just billed.

Q. In your opinion, was that a reasonable charge? A. Yes.

Q. So far as your records are concerned, can you state what was the kind of these repairs?

A. Repairing the Pioneer Crusher Plant.

Q. That was while it was being operated?

A. We have the original invoices here. You would have to refer to those.

Q. These were replacement parts, is that correct, so far as your records show?

A. Yes, repair parts, or replacement parts.

Q. So far as your records show, can you state whether or not the repairs were made to the equipment while it was being used in the performance of the work called for in the subcontract of February 7, 1945? A. Yes.

(Testimony of George J. Popovich.)

Q. In your opinion do you state that was a reasonable charge? A. Yes.

Q. Now, in connection with Schedule XXVII, Parts Purchased for Basich Brothers Construction Co., Equipment Not Fully Operated, February 14, 1945, to June 4, 1945, \$2,259.88. On what was that figure based?

A. From invoices presented by the vendors.

Q. What is that?

A. Invoices presented to us by the vendors.

Q. Presented to you in the ordinary course of business? A. Yes.

Q. In your opinion were the charges shown on the invoices set forth in Schedule XXVII reasonable charges? A. Yes.

Q. From your records can you state what those parts were used for?

A. In connection with the operation of the crushing plant and repair and replacement parts used in connection with the operation of the crushing plant.

Q. That is, used in connection with the operation of the Pioneer Crushing Plant while being operated by Duque & Frazzini? A. Yes.

Q. Those parts represent replacement parts worn out, is that correct? A. Yes.

Q. I understand it is customary that anyone who rents equipment not fully operated is to make those repairs, is that correct? A. Yes.

Q. In connection with Schedule XXVIII, Parts Taken From Basich Brothers Construction Com-

(Testimony of George J. Popovich.)

pany Stock, \$1,723.85. Upon what was that based?

A. Upon what was that based, did you say?

Q. Schedule XXVIII, Parts Taken From Basich Brothers Construction Company Stock, \$1,723.75. Am I in error there?

A. That is correct. I did not quite understand your question.

Q. I have not asked you a question. I just called this to your attention.

A. Yes, I have it.

Q. Upon what records, if any, did you arrive at the figure \$1,723.75?

A. The figures were arrived at from the books of original entry showing these particular materials and parts were released.

Q. They were required by whom?

A. Duque & Frazzini.

Q. Were they used in connection with any particular equipment, so far as your records show?

A. Yes.

Q. What equipment?

A. They were used for the crushing plant.

Q. That was the one they rented not fully operated, is that correct?

A. I would not know. I would have to refer to the details of this.

Q. I mean so far as your records are concerned?

A. So far as our records are concerned, it was used for the Pioneer, and also our equipment.

Q. Your own equipment? A. Yes.

(Testimony of George J. Popovich.)

Q. In connection with this operation under sub-contract of February 7, 1945? A. Yes.

Q. In your opinion would you state that the parts furnished by Basich Brothers, for the sum of \$1,723.75 was a reasonable charge? A. Yes.

Q. When you say stock of Basich Brothers, did you happen to have this in your own stock?

A. Yes, we have that tractor in our own stock. They requested parts. We supplied them, and charged them the same price they were charged to us.

Q. In other words, you made no profit in the deal? A. Yes, that is right.

Q. In other words, instead of buying it, you took it from your stock? A. Yes.

Q. You made no additional charge to them?

A. No.

Q. As shown by your invoices? A. Yes.

Q. In reference to Schedule XXIX, for Fuel, Grease and Oil on Equipmentt not Fully Operated, May 9, 1945, to June 31, 1945, \$732.47, upon what was that figure based?

A. From the original invoices submitted to us.

Q. From your records, for what was the fuel, gas and oil used?

A. Used in connection with the operation of the hot plant and other equipment.

Q. Of whom? A. Duque & Frazzini.

Q. Was any of it used in connection with any other operation outside of Duque & Frazzini's?

A. No.

(Testimony of George J. Popovich.)

Q. Upon what was the amount of \$732.47 based, on invoices? A. Yes, on invoices.

Q. In your opinion was that a reasonable charge? A. Yes.

Q. From your records, that was used exclusively in connection with Duque & Frazzini's operation? A. Yes.

Q. Now, you have Schedule XXX, Miscellaneous Labor Invoices, Etc., February 26, 1945, to June 16, 1945, \$2,814.24. On what record did you arrive at the figure \$2,814.26?

A. Books of original entry.

Q. Do the items scheduled in Schedule XXX correctly set forth the amount as shown by your books of original entry? A. Yes.

Q. Are those books of original entry kept in the course, ordinary course of your business?

A. Yes.

Q. Will you state in your opinion whether the amount of \$2,814.24 for the items so specified, was a reasonable charge? A. Yes.

Q. Upon what was that based, O.P.A. rates?

A. That was based on invoices submitted to us, and are labor charges.

Q. From your records would you state that the items set forth in Schedule XXX were used exclusively in connection with the Duque & Frazzini operation under the subcontract of February 7, 1945? A. Yes.

Q. You have Schedule XXXI Freight on

(Testimony of George J. Popovich.)

Rented Equipment, \$326.89. On what records was that based?

A. This was based from our shipping and stock memoranda.

Q. Original records which you made?

A. Yes.

Q. The items on Schedule XXI correctly set forth what your original records show?

A. Yes.

Q. What do your original records show, so far as these items are concerned—what were they for?

A. It showed that certain equipment was transported to Tucson, Arizona, from Los Angeles or elsewhere.

Q. To be used in connection with what operation?

A. Duque & Frazzini's operation.

Q. Exclusively? A. Yes.

Q. In your opinion was that a reasonable charge? A. Yes.

Q. Now, you have Schedule XXXII, Repairs Made by Others on Basich Brothers Construction Co. Equipment Not Fully Operated, June 9, 1945, to September 10, 1945, \$3,969.97. Upon what records was this amount arrived at?

A. From original invoices.

Q. Kept in the ordinary course of business?

A. Yes.

Q. Upon what was that based?

A. That was based on invoices presented to us by the various vendors for work done.

(Testimony of George J. Popovich.)

Q. In your opinion was that a reasonable charge? A. Yes.

Q. From your records can you state whether or not all of these repairs made were confined exclusively in connection with the work set forth in the subcontract of February 7, 1945?

A. Yes, according to our records.

Q. And in connection with no other work, is that correct? A. Yes.

Q. In reference to Schedule XXXIII, Parts Purchased for Basich Brothers Construction Co., Equipment Not Fully Operated, June 16, 1945, to September 9, 1945, \$3,215.19, upon what records were those figures based?

A. Invoices submitted to us for payment.

Q. In the ordinary course of business?

A. Yes.

Q. Can you state whether or not the amount set forth in Schedule XXXIII is correct, as shown by those invoices? A. Yes.

Q. In your opinion was the amount of \$3,215.19 a reasonable charge? A. Yes.

Q. From your records can you state whether or not the parts purchased in connection with equipment not fully operated were actually used in connection with and exclusively used in connection with the performance of work set forth in *some* contract of February 7, 1945?

A. Yes, according to our records.

Q. In connection with Schedule XXXIV, Parts Taken from Basich Brothers Construction Com-

(Testimony of George J. Popovich.)

pany Stock, \$1,028.91, upon what records was that amount based?

A. From records contained in our books of original entry, such as stock memorandums in our books, showing parts used.

Q. Was that made in the ordinary course of business? A. Yes.

Q. The amount charged, \$1,028.91, was a reasonable charge? A. Yes.

Q. From your records can you state whether or not these parts were used in connection, exclusively used in connection with the operation of the work set forth in the subcontract of February 7, 1945?

A. Yes, according to our records.

Q. In connection with Schedule XXXV, Fuel, Grease and Oil on Equipment Not Fully Operated, June 7, 1945, to September 6, 1945, \$1,371.50, upon what records did you arrive at this figure?

A. From records kept by our fuel man and these invoices submitted to us by Petroleum Company.

Q. Were they kept in the ordinary course of business? A. Yes.

Q. Does the amount set forth in Schedule XXXV correctly set forth the amounts shown on your records? A. Yes.

Q. In your opinion, is the amount set forth in Schedule XXXV a reasonable charge?

A. Yes.

Q. From your records can you state whether or not fuel, grease and oil on this equipment were used

(Testimony of George J. Popovich.)

exclusively in connection with work performed as specified in the subcontract of February 7, 1945?

A. Yes, from our records.

Q. In connection with Schedule XXXVI, Miscellaneous Labor, Invoices, Etc., from June 7, 1945, to September 17, 1945, \$4,803.15, can you state upon what records the amount set forth in this schedule was arrived at?

A. Yes, from invoices presented to us for payment, and books of original entry.

Q. And they were kept in the ordinary course of business? A. Yes.

Q. In your opinion is the amount set forth in this Schedule XXXVI a reasonable charge?

A. Yes.

Q. From your records can you state whether or not the labor and invoices shown in Schedule XXXVI were used exclusively in connection with the performance of work set forth in the subcontract of February 7, 1945?

A. Yes, according to our records.

Q. I notice in Schedule XXXVI you use the words "Overtime" and "Downtime." What do you mean by that?

A. As I mentioned before, J. G. North had a contract with us, and our prime contract—in drawing up the agreement we stated in the event trucks were kept, and worked on the job, and we were unable to use them, or Duque & Frazzini were unable to use them, so much was to be paid for labor only; not for the use of the trucks. To arrive at these

(Testimony of George J. Popovich.)

amounts, by taking into consideration the time the plant was down——

Q. I want to know what they mean.

A. Overtime for labor in excess of 8 hours work, and downtime was the time the equipment was not in use, and we had to pay for labor.

Q. Schedule XXXVII, Freight on Rented Equipment, \$663.39, upon what was that based?

A. Based upon the original invoices received by us, and also the Railroad Commission freight rate.

Q. That was kept in the ordinary course of business? A. Yes.

Q. In your opinion was that a reasonable charge? A. Yes.

Q. From your records can you state whether or not freight on rented equipment was equipment used in connection with, and used exclusively in connection with the Duque & Frazzini work, set forth in the subcontract of February 7, 1945?

A. Yes, from our records.

Q. In connection with Schedule XXXVIII, Production Gravel Base, \$25,191.44, upon what records was this production based to arrive at the figure set forth in the Bill of Particulars?

A. That was arrived at from engineering estimates, our engineer's records and other records.

Q. Were those records kept in the ordinary course of business? A. Yes.

Q. Does the amount set for in this schedule set forth the amounts as shown by those records?

A. Yes.

(Testimony of George J. Popovich.)

Q. In connection with Schedule——

A. On Schedule XXXVIII you forgot also to mention there was an error.

Q. What error was that?

A. On Schedule XXXVIII the estimate dated June 15, 1945, which shows 567 cubic yards, which is the quantity shown on this exhibit, should read 457 cubic yards, instead of 567. Therefore the total of 54,750 cubic yards, is correct, and agrees with the United States Engineers' final estimate.

Q. Referring to Schedule XXXVIII, what correction would you make? You have \$25,191.44.

A. The total is correct, but one of the items, line 13, dated June 15, 1945, 567 cubic yards, that should be changed to 467 cubic yards.

Q. Is the total amount of cash correct?

A. Yes.

Q. In reference to Schedule XXXIX, Production Gravel Stabilized Base, \$4,109.20, upon what records were they based?

A. Upon engineers' quantities.

Q. Were they kept in the ordinary course of business? A. Yes.

Q. The amounts set forth in these items correctly show what the engineers' reported estimate is, is that correct? A. Yes.

Q. With reference to Schedule XXXX, Production Gravel Embankment, \$4,719.60, upon what records was that based?

A. Engineers' estimates.

(Testimony of George J. Popovich.)

Q. Was that kept in the ordinary course of business of the operation? A. Yes.

Q. These items correctly set forth the amount set forth in the engineers' estimate? A. Yes.

Q. Schedule XXXXI, Production Concrete Aggregate, \$70,710.52, upon what records was that based? A. Engineers' estimates.

Q. Was that kept in the ordinary course of business? A. Yes.

Q. Does the amount set forth in this Schedule XXXXI correctly show what is shown in the engineers' estimates? A. Yes.

Q. On Schedule XXXXII, Production Mineral Aggregate, \$15,377.93, upon what records was that based? A. On engineers' estimates.

Q. Was that correctly kept in the ordinary course of business? A. Yes.

Q. Does this amount shown on Schedule XXXXII correctly set forth the amount shown on the engineers' records? A. Yes.

Q. Schedule XXXXIII, Production Concrete Aggregate for Structures, \$405.30, upon what records was that based? A. Engineers' records.

Q. Does the amount set forth in Schedule XXXXIII correctly show the amounts set forth in the engineers' records? A. Yes.

Q. Were those engineers' records kept in the ordinary course of business? A. Yes.

Q. Schedule XXXXIV, Miscellaneous Credits, \$1,319.86, upon what was that based?

A. From engineers' records.

(Testimony of George J. Popovich.)

Q. Miscellaneous credits?

A. Yes, from engineers' records and invoices submitted to individuals that obtained this material.

Q. Does this amount correctly set forth the amount shown on those records? A. Yes.

Q. And those records were kept in the ordinary course of business? A. Yes.

Q. In computing the dollars and cents, did you use as a basis the amount as specified in the subcontract for allowance? A. Yes.

Mr. Monteleone: That is all.

(Whereupon, an adjournment was taken until 2:00 o'clock p.m.)

Los Angeles, California

Tuesday, February 4, 1947, 2:00 p.m.

GEORGE J. POPVICH

recalled as a witness by and on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

Direct Examination

(Continued)

By Mr. Monteleone:

Q. Mr. Popovich, based on all of the records kept in the ordinary course of business by Basich Brothers in connection with the performance of the requirements contained in the subcontract of date February 7, 1945, introduced in evidence as Plaintiff's Exhibit 1, can you state whether or not the

(Testimony of George J. Popovich.)

Bill of Particulars, and the amendment thereto, referred to in the previous testimony, subject to corrections which were made, as has been testified or explained to the court, contains a full, true, complete and accurate statement of all of the charges and credits in connection with that particular matter? A. Yes, sir.

Mr. Monteleone: That is all.

Cross-Examination

By Mr. McCall:

Q. Mr. Popovich, were you ever on the job at Tucson, Arizona? A. No.

Q. Then all the information or testimony you have given here, you got it from records submitted to you by someone else, is that right?

A. From someone else's records, and records we kept in the home office.

Q. And the records which you kept in the home office were in turn taken from records given to you by somebody else in Tucson, is that right?

A. Yes, and also submitted by the home office to Tucson.

Q. I believe you said, in connection with Schedule I, that the information which you used to make up that schedule was taken from payroll sheets which you have in court? A. Yes.

Q. Do you have those before you?

A. Yes, we do.

Q. How many payroll sheets do you have making up Schedule I?

(Testimony of George J. Popovich.)

A. We have all payroll sheets from the beginning of the job, January 29th to October 13, 1945.

Q. To what date in October?

A. The 13th.

Q. Your last record then was October 13, 1945?

A. That is the date the job was finished.

Q. The first payroll record was January 29?

A. Beginning with January 29.

Q. Can you look at your records and tell when you made the first charge against Duque & Frazzini?

A. Commencing with the period February 11 to February 17, the first week that we commenced.

Q. How many time sheets do you have for Schedule I?

A. Well, sir, we had all of them. There was all together, starting with 1—we have a grand total of 37 weekly payroll sheets.

Q. And those are not all relating to Schedule I of your Bill of Particulars? A. Correct.

Q. You are unable to state then how many payroll sheets you used in making up Schedule I?

A. I don't quite follow you there, sir.

Q. In making up Schedule No. I of your Bill of Particulars, I understood you to testify in your direct examination this morning that the payroll sheets were the basis of your information in making this up. A. Yes, sir.

Q. Will you refer then to the first payroll sheet that you have, which is from February 11 to 17, you state.

A. All right. Do you have reference to our pay-

(Testimony of George J. Popovich.)

roll sheet or Duque & Frazzini's payroll sheet? We have both of those here.

Q. Which did you use in making up Schedule No. I?

A. Payroll sheets and time cards as submitted by Duque & Frazzini.

Q. That is, to make up your Schedule No. I?

A. Yes, sir.

Q. Do you have the time cards in court?

A. We have some here, but we did not bring them all.

Q. Will you show me the payroll sheet from February 11 to February 17, please?

A. Yes, we have it right here. That is the one presented to us by Duque & Frazzini, and here are both of them.

Q. This weekly payroll sheet that represents time covering the term from February 11, 1945, to February 17, 1945, Sheet No. 1, or two sheets, Payroll No. 3, does this weekly payroll sheet contain the employees only who worked on the subcontract for that week?

A. That contains the subcontractors and our employees.

Q. Plus your employees too? A. Yes.

Q. The employees on this sheet then are the employees on the general job, the entire job?

A. Yes, with the proper segregation made on the distribution sheet for the various charges.

Q. And they are listed in alphabetical order, are they not? A. Yes, they are supposed to be.

(Testimony of George J. Popovich.)

Q. Would you point out to counsel and the court where the segregation is made for the employees for Duque & Frazzini?

A. Yes, we have Duque & Frazzini shown right here, account No. 7, which represents accounts receivable charges, Duque & Frazzini.

Q. From what information, Mr. Popovich, did you make this segregation?

A. That was made from Duque & Frazzini payrolls submitted to us, plus time cards.

Q. Were the payrolls and time cards submitted to you, or someone else?

A. That was submitted to the home office. That was the original payroll of the job, which was submitted to the home office.

Q. This payroll they submitted to the home office is the only thing that you saw?

A. Yes.

Q. You did not see timecards therefor too?

A. I did see the time cards, in making the audit with Homer Thompson.

Q. This sheet on top attached, is that the weekly payroll of Duque and Frazzini?

A. Only that time sheet represents a payroll distribution, classifying the distribution of the various types of operation and work, including Duque & Frazzini accounts receivable, subcontractor.

Q. You do not have the payroll then of Duque & Frazzini separate from the other payrolls?

(Testimony of George J. Popovich.)

A. Yes, we do, from Duque & Frazzini payroll sheets. This information is exactly set forth in our payrolls.

Q. Would you show me then, Mr. Popovich, the weekly payroll sheet which you received from Duque & Frazzini, please? Which is the payroll sheet which you received from Duque & Frazzini? What you have handed me is comprised of many sheets.

A. These represent each weekly payroll sheet.

Q. For Duque & Frazzini only?

A. For Duque & Frazzini only. This is the sheet that was turned over to our office manager, Homer Thompson, by Duque & Frazzini.

Q. I understood you to say that you had weekly payroll sheets covering the time from February 11 to February 17, for Duque & Frazzini. Can you point them out for us?

A. I had the payroll sheet from February 11 to February 17?

Q. Yes.

A. That's the one on top. That is the sheet that our field office received.

Q. Does that include the second sheet next to it?

A. Yes, sir, he has received all these sheets. These were made up by Duque & Frazzini.

Q. They cover from February 11 to February 17?

A. And also other weekly payroll sheets.

Q. Can you show us where are the names of the employees, submitted by Duque & Frazzini?

(Testimony of George J. Popovich.)

A. On the left-hand column of each sheet, it shows the last name and the first name.

Q. The sheet next to that, this large weekly payroll sheet, where did this come from?

A. Duque & Frazzini.

Q. And that covers only the employees of Duque & Frazzini?

A. You have particular reference to the one ending March 10?

Q. From the 17th of February to March 10.

A. This is the one you have particular reference to, isn't it, sir?

Q. Would you read the question again to the witness?

(Question read by the reporter.)

Mr. Monteleone: Mr. McCall, you pointed out a certain document to the witness. He is wondering whether you specified the particular document you are referring to.

Mr. McCall: I will try to frame it more intelligently then.

Q. Mr. Popovich, the large sheet that you hold next to you there, does that contain employees only of Duque & Frazzini, or others too?

A. As explained to you, this contains Duque & Frazzini. We also have time cards representing Duque & Frazzini, but we don't have all the time cards here.

Q. Does this contain Duque & Frazzini's employees only?

A. This sheet here?

Q. Yes.

A. Yes.

(Testimony of George J. Popovich.)

Q. No other employees except those who worked for Duque & Frazzini?

A. As explained, there were time cards also for Duque & Frazzini, but they are not included here.

Q. The employees mentioned on the time cards for Duque & Frazzini are not included here?

A. We have other time cards that might not be Duque & Frazzini payroll. This is one portion. We have another portion we did not bring all the time cards up, but, however, we do have some time cards that represent the payroll of Duque & Frazzini.

Q. As I understand it, Mr. Popovich, the payroll sheets that you have before you there, from which you made up Schedule No. 1 of your Bill of Particulars, show the name of the employee and the amount of his wages, is that right?

A. Yes, sir.

Q. Now, where is Jack Brown shown on your payroll sheet?

A. For the week ending March 10, shown here.

Q. Is it shown prior to that?

A. I would have to look at the previous payrolls to determine that. You have reference to March 17. I have it here, sir. Here is Joe Brown.

Q. From this payroll sheet you say that you made up Schedule No. I? A. Yes, sir.

Q. Then how did you segregate——

A. The time cards?

Q. Then how did you segregate these employees

(Testimony of George J. Popovich.)

shown in Schedule I, say Jack Brown and Jack L. Brown?

A. How did we segregate them, sir?

Q. Yes, how could you tell that they were Duque & Frazzini's employees?

A. By the time cards submitted to the field office and weekly payroll sheets submitted to the office.

Q. Where are the weekly payroll sheets?

A. These are the ones.

Q. This is the weekly payroll sheet for the period from March 11 to March 17?

A. Yes, sir.

Q. Do you know who made up this sheet?

A. Who made it up, sir?

Q. Yes.

A. No, Homer Thompson was field office manager.

Q. He made it up?

A. No, Duque & Frazzini made this up, and they were presented to him.

Q. Do you recognize the handwriting as being that of Duque or Frazzini?

A. I don't know. I never checked their handwriting.

Q. That was just the information that was given to you? A. Yes, sir.

Q. Did you ever see the time cards prepared by Duque & Frazzini?

(Testimony of George J. Popovich.)

A. Did I ever see the time cards prepared by Duque & Frazzini?

Q. Yes.

A. No, sir, I never was on the job.

Q. Or on Schedule No. 1?

A. I wasn't on the job. I didn't see them prepared.

Q. So you don't know whether there are any time cards on Schedule No. 1 or not, do you?

A. I didn't find time cards. Those from the weekly payroll sheets show that there are time cards and weekly payroll sheets from Duque & Frazzini.

Q. This which purports to be the weekly payroll sheet is the regular payroll sheet that was used by the Basich Construction Company on all of its jobs?

A. That's right, our regular forms, yes, sir.

Q. I will ask you to look at that payroll sheet from February 17th to March, and state if it is signed by either Duque or Frazzini?

A. What dates were those, sir?

Q. From February 17 to February 24?

A. I don't see any signatures on the payroll.

Q. Will you read them?

A. Will I read them?

Q. Will you state to the court, Mr. Popovich, if you can find the signature of Duque or Frazzini on any of the payroll sheets?

A. I would have to go through all of these. I have many time cards here showing the signature of Duque & Frazzini.

(Testimony of George J. Popovich.)

Q. Isn't it a fact, Mr. Popovich, that none of the weekly payroll sheets were ever signed by Duque or Frazzini?

The Court: So far as you know, from the evidence before you?

A. Yes, I would have to check these. These were the ones presented to us, which show Duque & Frazzini's name, but whether or not it was their handwriting I would not know. These were presented to our field office, to the manager, Homer Thompson.

Q. Have you a time card in front of you which has the signature?

A. Yes, sir.

Q. Of anyone?

A. Here is Mr. Duque, Duque, Duque, Frazzini.

The Court: Do you want to look at some of these exemplars here?

Mr. Monteleone: I notice this is dated May 9. Do you have any from February?

A. We haven't checked them all, sir. I would have to go through all the time cards to answer that.

Q. (By Mr. McCall): It appears these are all for May and for June.

A. There are some here for May, June, and, as I mentioned to you, we have other time cards also which we did not bring with us.

Q. Mr. Popovich, do you have a weekly payroll sheet covering the time from February 24 to March 3rd?

A. Yes, sir, we have the original payroll sheet here. The week ending February—do you have reference to the week ending February?

(Testimony of George J. Popovich.)

Q. No, from February 24 to March 3rd.

A. February 24 to March 3rd. Here is the home office original payroll sheet.

Q. Is this large sheet from February 25 to March 3rd the original payroll sheet?

A. The original payroll sheet sent to the home office by the field office.

Q. And it includes all the employees of both Basich Brothers Construction Co. and Duque & Frazzini? A. Yes.

Q. It includes those in alphabetical order?

A. Yes.

Q. What do you have here that would indicate any of these employees worked for Duque & Frazzini on the subcontract?

A. We have records to support the charges made against the subcontractor, Duque & Frazzini. Those records were compiled from the daily time cards and weekly payroll sheets that were submitted to our field office.

Q. Do you have the weekly payroll sheet that was submitted for this particular time?

A. We have the weekly payroll sheet. However, we don't have all the time cards.

Q. Would you exhibit the weekly payroll sheet for the time from February 25 to March 3rd?

A. Our payroll sheet last year?

Q. Would you exhibit that to the court?

A. Yes, sir.

Q. What you have just shown to the court there

(Testimony of George J. Popovich.)

is a record which was furnished to you by your home office, is that right? A. Yes, sir.

Q. It does not purport to cover the subcontract employees only; it covers all employees on the job?

A. Yes, sir, with the proper notation on them, of the labor for Duque & Frazzini.

The Court: I think we ought to identify this. It is a document which I do not feel like taking away from your records. The Income Tax Department might want to see it some time. Let us identify it by saying there is presented to me three large sheets entitled: Weekly Payroll Sheet, called Payroll No. 5, Job 19, at Tucson, which list alphabetically the names of the employees, and the capacity in which employed, the hours they work each day of the week, the total of hours, the rate of pay, gross wages, Federal Old Age Tax, total deductions, net amount due, and Check No. so and so.

Then in front of it is the distribution sheet entitled: Payroll Distribution. Which distributes the wages as paid to various activities, such as removing, miscellaneous utility, excavation, grading, scarifying, and so forth. Also the names of persons or firms for whom these accounts were paid: Duque & Frazzini, J. G. North, F O A. Payroll distribution. Each one of these weekly sheets has in some form or other a payroll distribution attached to it?

A. Yes; those are the detailed records that this was made up on.

(Testimony of George J. Popovich.)

Q. After you make up this payroll sheet—shall we call it the master sheet? A. Yes, sir.

Q. Then you attach to it the distribution sheet which allows you to charge to various departments of your own, and to other persons to whom you have advanced the money, the particular amount?

A. Yes.

Q. My question is, do all your other payroll sheets have such distribution sheets attached to them? A. Always.

The Court: I think that is description enough.

Q. (By Mr. McCall): Then, Mr. Popovich, this distribution sheet was made by whom?

A. Made by the field office, Homer Thompson.

Q. Did you have before you the payroll data from which it was made?

A. Yes, sir, we did have Duque & Frazzini's weekly payroll sheets. However, we don't have all the time cards available here.

Q. Will you exhibit to the court now the information from which you made this distribution sheet which you just showed the court?

A. This distribution sheet here?

Q. Yes.

A. We don't have all that information here, sir.

Q. Do you have any of it here?

A. May I ask Homer Thompson if we brought any of that?

Q. If you don't know it of your own knowledge.

A. We don't have it here. We have so many files—about 15 or 20 files made up on this job.

(Testimony of George J. Popovich.)

Mr. Monteleone: You have seen them, Mr. McCall.

Q. (By Mr. McCall): I show you what purports to be a memorandum to the defendant Glens Falls Indemnity Company, regarding plaintiff's Bill of Exceptions, which I hand to you, and I will ask you if you have seen that before?

A. Yes, sir.

Q. Beginning with page 1 there, which says: Page 1 of Bill of Particulars, on the left-hand side; then we have the name Jack Brown, tractor driver, and 3/17/45, Saturday, time card recorded 8½ hours, was paid for 11 hours, overpaid 2½ hours, \$5.62. Did you check that to see if it corresponded with your records?

A. The time card, sir?

Q. Yes.

A. We have no knowledge of any time cards. We have never seen them. Duque & Frazzini's payroll sheet, submitted to us, showed 11 hours Saturday work, March 17th. He was paid for 11 hours.

Q. Where is the time card, or the information from which you got the 11 hours?

A. Duque & Frazzini's weekly payroll sheet.

Q. Where is the 11 hours shown on Duque & Frazzini's weekly payroll sheet?

A. Here, sir.

Q. Isn't that the sheet that was made by someone other than Duque & Frazzini?

A. This weekly payroll sheet was submitted by

(Testimony of George J. Popovich.)

Duque & Frazzini to Mr. Homer Thompson, our office manager.

Q. Do you know of your own knowledge that this individual sheet was prepared by Duque & Frazzini?

A. I was not on the job. I would not know, sir, but from the records submitted to Homer Thompson, and I verified it with the payrolls, and the moneys paid, they are correct, sir.

Q. You have no further information to support that? A. That's right.

Q. I show you what purports to be a time card. On the card it reads: Basich Brothers Construction Company. Time card for 3/14/45. Name J. L. Brown, and I will ask you *have ever* seen that time card before. A. No, sir.

Q. Do you know if it is signed by Jack Brown?

A. I don't know his signature.

Q. How many hours does it show?

Mr. Monteleone: I object to that, if the court please. There is no proper foundation laid that this man has ever seen this type of card.

The Court: I think he can look at it and see what it contains.

Mr. Monteleone: If your Honor please, may I call the court's attention to the deposition of Mr. Frazzini that was taken here? Probably the court has not had time to read it.

The Court: I did not have an opportunity.

Mr. Monteleone: Let me read this portion from

(Testimony of George J. Popovich.)

page 42. These were questions I asked Mr. Frazzini, whom I had never seen before:

“Q. Incidentally, what did you do by the way, with the time cards after they were prepared by you or under your supervision?

In other words, the daily time cards were converted into weekly payrolls submitted to Basich Brothers.

“A. Segregated them into boxes for time periods.

“Q. And did you prepare a payroll from those time cards?

“A. I did not do so personally.

“Q. Who did?

“A. I believe that if any were prepared that they would be by Mr. Duque who was preparing the payroll cards.

“Q. I see. And when those payroll cards were prepared by Mr. Duque, what was done with those cards?

“A. They were put into boxes and kept in our office.

“Q. Were any of them given to Basich Brothers Construction Company?

“A. Not to my knowledge.

“Q. Do you know what became of those payroll cards? A. I do.

“Q. Where are they?

“A. I gave them to Mr. John Bray of the Glens Falls Indemnity Company for checking and auditing.

(Testimony of George J. Popovich.)

“Q. When did you give these payroll cards to Mr. Bray?

“A. As near as I can remember, I would say some time last fall.”

If your Honor pleases, Mr. McCall apparently had these time cards at the time Mr. Basich's deposition was taken, and had an opportunity to call them to Mr. Basich's attention.

The Court: I think they can show by comparison what was on the time cards, because some time cards have shown up. Go ahead. Overruled.

A. We have never had time cards at all, sir. That is, we have never seen those time cards.

The Court: Before now?

A. That's right. The only thing we went by was given to us by Duque & Frazzini.

Q. Whether that shows a correct reflection of the time cards or not, you don't know?

A. No.

Q. Somebody may have made a mistake?

A. Yes.

Q. Duque & Frazzini handed you the sheet?

A. Yes. That was on the sheet, 11 hours, and we paid 11 hours.

Q. (By Mr. McCall): Then I will ask you to look at that memorandum relative to plaintiff's Bill of Particulars, from page 1 to page 15, which covers——

A. Is that Schedule I?

Q. Plaintiff's Schedule I?

A. I have it.

(Testimony of George J. Popovich.)

Q. ———which purports to cover the difference in time on Schedule 1? A. Yes, sir.

Q. I will ask you if you have ever seen any cards, or any of these names—time cards?

A. Well, sir, I made a detailed audit of the questions you have asked. They came to me. The dates specifically I can't tell you, because I have got about 50 pages, and I couldn't point out any particular one.

Q. You do not on the first 15 pages then find any errors in your Bill of Particulars which are mentioned here?

A. Well, sir, I have all the answers for all your questions here. I will have to refer to each sheet.

Mr. Monteleone: Mr. McCall, there were certain items in your exceptions that I corrected this morning. Subject to the correction made this morning.

Q. (By Mr. McCall): Subject to the corrections made this morning?

A. Well, sir, I don't know of any, unless I refer to my working papers in detail.

Q. Outside of corrections you made this morning, you would say you have not seen any information to support the entries mentioned from pages 1 to 15?

A. I did not see any other papers except the daily time cards and the weekly payroll sheets.

Q. Some of these items mentioned on page 15 I notice were corrected by counsel this morning?

A. Yes, sir.

(Testimony of George J. Popovich.)

Q. On Schedule No. 2, Mr. Popovich, can you tell the Court what Schedule No. II covers in your Bill of Particulars?

A. Yes, sir, No. II covers Pioneer crushing operation from March 25 to June 9.

Q. Then, will you look at the name Hutchins, on page 3 of Schedule II. He is listed as a welder, but was paid \$1.75 regular time, and \$2.625 over-time. Do you have that before you?

A. Yes, sir.

Q. Do you have the welders' rates before you?

A. I do not. I did not bring the rates with me, sir.

Q. Do you know whether or not he was paid the rate of \$1.375 regular time, and \$2.0625 over-time, or \$2.25 overtime for that day? Do you know whether he was paid it or not?

A. I have checked the payroll, sir, and found we paid him \$1.75. Duque & Frazzini borrowed this employee from us, and we always paid Mr. Hutchins \$1.75 an hour for straight time, because he was considered a foreman.

Q. Then since you have looked over the comments here on Schedule II—is that Manuel Villareal? A. Did you say page 18, sir?

Q. Yes.

A. I don't have anything on him.

Mr. Monteleone: There was a correction made on page No. 23.

The Witness: What page?

Mr. McCall: Page 18 of your comments on the

(Testimony of George J. Popovich.)

Bill of Particulars, and it is on page 23 in the Bill of Particulars. A. Yes, I have that here.

Q. The information given in our statement is correct on that, isn't it?

A. Sir, this shows an overcharge in the amount of \$6.12 was made. Therefore, the correct charge should have been \$49.44 instead of \$55.56. I thought Mr. Monteleone brought that out.

The Court: He wants to know, other than that correction, do you have any others as to which you admit an error? A. We might have.

Q. (By Mr. McCall): On Schedule II you have all the cards on that schedule, have you not?

A. We have those cards that were presented to us by Duque & Frazzini, and the weekly payroll sheets presented to us by Duque & Frazzini. I don't think we have all the time cards. We have some of the cards. They are all at the office, those that we don't have here.

Q. Schedules I to V represent the payrolls of Duque & Frazzini, do they not?

A. Schedules I and V?

Q. Of your Bill of Particulars.

A. It all has reference to Duque & Frazzini. Schedule II has, Schedule III has, Schedule IV has, and Schedule V has reference to Duque & Frazzini.

Q. Do you have before you Schedule No. II, Mr. Popovich? A. Yes, sir.

Q. What is that schedule for?

(Testimony of George J. Popovich.)

A. Schedule II is payroll for Pioneer Crusher from March 25, 1945, to June 9, 1945.

Q. Can you tell the court why this payroll for the Pioneer Crusher was kept separate from the payroll shown in your Schedule No. 1?

A. I don't know.

Q. Do you recognize these employees in Schedule II as old employees of Basich Brothers Construction Co.?

A. We have so many of them. Hutchins I know is; I know Lew Stephenson. It is hard for me to say just who I know, because we have had three or four hundred men working for us on different projects.

Q. Paul Albino, mentioned in the first line of Schedule II, is that an old employee?

A. He worked for us off and on. Not steady, though.

Q. How many years had he been working for Basich Brothers?

A. I would not know, sir. I would have to refer to our records.

Q. Then in your comments, from page 16 to page 19, regarding Schedule II, in which the men are paid higher than their ratings called for, do you know why they were paid higher than the rating?

A. They were paid according to the weekly payroll sheet submitted to us showing the rates Duque & Frazzini sent to us.

(Testimony of George J. Popovich.)

Q. The weekly payroll sheets show the rate?

A. Yes, sir, they do have the rates.

The Court: When you loaned an employee to them, you paid them regardless, whether it was the current rate or not?

A. Yes, sir, whatever our men received, if they were borrowed they were paid the same rate that we paid them.

Q. (By Mr. McCall): Mr. Popovich, will you exhibit to the court the payroll sheets on Schedule No. II?

A. You will have to be more specific, because there are a lot of payrolls here.

Mr. McCall: Will you please read the answer, just prior to this one, showing what Schedule No. II was made up from?

(Record read by the reporter.)

Mr. Monteleone: Have you got Schedule No. II?

A. I have it.

The Court: That is 3-25-45 to 6-9-45. Pioneer Crusher?

A. Yes. That was made up from my weekly payroll sheets and daily time sheets that were presented to us.

Q. (By Mr. McCall): Will you exhibit to me please, Mr. Popovich, one of the weekly payroll sheets on Schedule II?

A. They cover a period from March 25 to June 9th.

Q. Yes.

(Testimony of George J. Popovich.)

A. We have one here from May 20 to May 26. That's our original payroll sheet.

Q. None of these which you have exhibited to me, which you call your original payroll sheets, was submitted to you by Duque & Frazzini, was it?

A. Sir, here are weekly payroll payroll sheets submitted to us by Duque & Frazzini. Also we have daily time cards sent to us by Duque & Frazzini.

Q. Time cards on Schedules I or II?

A. We have weekly payroll sheets, and we also have daily time sheets to support any charges made to Duque & Frazzini. They were either on the daily time cards, or they were on the Duque & Frazzini weekly payroll sheets.

Q. Then would you show me, please, Mr. Popovich, the weekly payroll sheets from which this master sheet was made up?

A. Yes, here is the weekly payroll sheet. I don't think we have all the daily time cards with us, but we do have some of them here, sir.

Q. What is there on that that you can tell that it is made up of Schedule No. II?

A. Well, sir, we have sheets where this has been taken into consideration and posted on it, our weekly payroll sheets.

Q. Referring to your bill of particulars on Schedule No. 2, will you show the court just how you took it off of these records, and put it on your bill of particulars?

A. We did not bring all of our accounting working papers up here, which we used, but we

(Testimony of George J. Popovich.)

did have a segregation of the labor charges of Duque & Frazzini, but we would have to have all the working papers here to answer the question.

Q. You are not able to exhibit here how you made up Schedule No. II from the records you have here in court today.

A. Homer has some time cards, but we do not have all of them because, as I said, we have so many files it would be impossible. Here are the daily time cards signed by the employee, and approved by Duque & Frazzini's foreman.

Mr. Monteleone: What schedule is that one, Mr. McCall?

The Court: How can you tell, by the date?

A. I can tell by the date, sir. See right here. You would have to point each particular thing out, so we could support them, because it is impossible to pick them out of the air.

Q. Mr. Popovich, I believe you stated to the court that the payroll sheet on Duque & Frazzini covers Schedule No. II, is that correct?

A. I stated, sir, that the weekly pay roll sheets, together with daily time cards, represent charges in Schedule II.

Q. Mr. Popovich, is it not a fact that you do not have any payroll sheets from Duque & Frazzini covering Schedule No. II? A. Sir?

Q. Is it not a fact that you do not have any payroll sheets covering Schedule II?

A. Well, sir——

Q. That is, made up by Duque or Frazzini?

(Testimony of George J. Popovich.)

A. Sir, all of this information was taken from Duque & Frazzini's daily time cards, plus weekly pay roll sheets. All factors were taken into consideration to arrive at the charges appearing on Schedule I. We worked with both of them. We have everything here. There is no distinction made as to who prepared them for Duque & Frazzini. They are all considered Duque & Frazzini time cards and weekly payroll sheets. We did not make any distinction. They are here. Your time cards and your weekly payroll cards, all of this data was to make up the weekly payroll and accounts receivable by Duque & Frazzini.

Q. Did you make any distinction between the data that you used to make up Schedules I and II?

A. Did we make a distinction?

The Court: Did you make any distinction between the data used between I and II?

A. We used all this data to compile this. That is the detail of all the particulars here. It was necessary to use all the data we received from Duque & Frazzini.

Q. Since you have these records before you, Mr. Popovich, can you illustrate to the court how you went about to make up Schedule I or Schedule II of your Bill of Particulars from that data?

A. We don't have the working papers with us. I transposed this data onto the working paper to show the distribution or segregation. However, we do have them at the office.

Q. So you cannot illustrate to the court how

(Testimony of George J. Popovich.)

you used this data in making up your Bill of Particulars?

A. We don't have all the necessary data to do that.

Q. You referred to your working sheets as to the data, Mr. Popovich. What kind of material is that?

A. Well, sir, to make this accounting for the Pioneer Crusher, that was carried separately. That distinction apparently was made on the accounting distribution for a reason I don't know. But all the men that were performing on the Duque & Frazzini operation, they were charged on the accounts receivable, subcontractor, Duque & Frazzini. Mr. Homer Thompson has compiled that data, and I have made that distinction. I would have to go through all of that data to pick out each one employed, but if you refer to Schedule II we do have the names of those individuals, but these are not original records we used.

Q. Then personally, Mr. Popovich, you cannot go through these master sheets and point out from the record that you have, the difference between the employees of Duque & Frazzini, and those of any other contractor?

A. You could, because we have weekly payroll sheets, and have Duque & Frazzini's daily time cards, and so, therefore, we could say those charges were made to Duque & Frazzini, because we do have their slips here. As for the segregation, we have that data. We have the data I have testified to.

(Testimony of George J. Popovich.)

Mr. Homer Thompson compiled the data to show how we arrived at it, but we do have all the weekly payroll sheets and time cards.

(Short recess.)

Q. (By Mr. McCall): I believe you stated before recess that you have before you some of the weekly payroll sheets submitted to the plaintiff by Duque & Frazzini, from which you made up Schedule No. II, is that correct?

A. Yes, we have the weekly payroll sheets, and some of the time cards; not all of them.

Q. The time cards that you have before you are dated in what month?

A. Some of them are in May. Here is one May 14th. We have some in June.

Q. All the others are June, 1945, are they not?

A. We have them in May. Like I say, I would not know, because I don't have them all with me.

Q. How many do you have for the month of May?

A. I would have to segregate them. May, and some for June; just a few were all we brought.

Q. You only have one for the month of May, don't you?

A. We have quite a number. Here they are. Here is May 14th?

Q. Will you look at the weekly payroll sheet from which you made up Schedule No. II, and find on that the name of Paul Albino?

A. What page is that on, sir?

(Testimony of George J. Popovich.)

Q. Schedule No. II of your Bill of Particulars shows the first name to be Paul Albino. Will you look on the weekly payroll sheets submitted to you by Duque & Frazzini, and find Paul Albino?

A. Here is one right here.

Q. Just the payroll sheets only.

A. You are making a segregation between the cards and the sheets?

Q. I was asking, Mr. Popovich, if you can show the court here how you made the segregation you prepared on Schedule No. II?

A. We have daily time cards which we used to make that schedule.

Q. You do not have any weekly payroll sheets then to make up Schedule II, is that right?

A. We have weekly payroll sheets, the original weekly payroll sheets, that cover all of Schedule II, but no segregation was used for any of them. We don't have all the time cards here to support all of them.

Q. When you referred to the original payroll sheets, you have reference to the master payroll sheet prepared by Basich Brothers, do you not?

A. When I speak of the original payroll sheet, I am speaking of the original payroll sheet submitted to the home office showing a list of all employees of Duque & Frazzini, and others, and Basich Brothers.

Q. That is all you have from which you made your Schedule No. II of your Bill of Particulars, is it?

(Testimony of George J. Popovich.)

A. No, sir, you couldn't make that schedule from these. I have got information to support these. What we have to support them are some time cards, and some weekly payroll sheets of Duque & Frazzini.

Q. Can you show the court one weekly payroll sheet submitted to you by Duque & Frazzini, from which you made up any part of Schedule II?

A. We don't have all the information here that we used to compile Schedule II.

Q. Do you have before you in court any weekly payroll sheets submitted to the plaintiff by Duque & Frazzini from which Schedule No. II was prepared?

A. All of the information that we used to prepare them was taken off of either weekly payroll sheets submitted to us by Duque & Frazzini, or from time cards presented to us by Duque & Frazzini.

Q. Will you read the question to the witness, Mr. Reporter?

(Record read by the reporter.)

A. Do you have particular reference to these sheets here, sir, these weekly payroll sheets?

Q. I only have reference to any payroll sheet submitted to you by Duque & Frazzini from which Schedule No. II was prepared?

A. We have weekly payroll sheets and we have time cards presented to us that were used to compile all the information set forth in Schedule No. I.

(Testimony of George J. Popovich.)

Q. I will ask you then to examine the time cards and the weekly payroll sheet which you used in preparing Schedule No. II.

A. We don't have all the records here to support them.

The Court: Counsel wants to know if you have any weekly sheet.

Mr. Monteleone: No, I don't think we have.

The Court: Let us go on. It is quite evident he does not have all the information here.

Q. (By Mr. McCall): And that is the same with reference to the comment we have made on Schedule No. III, is it not? If you will refer to your comments, Mr. Popovich?

A. Yes, sir, that is true for No. III. We don't have all the records here with us.

Q. And also for No. IV, No V?

A. We don't have all the records here for IV or V.

Q. You do not know whether the things that we have pointed out in there are errors or not, is that right?

A. I have my working papers here, and I have checked everything brought out in Schedules III, IV and V.

Q. Can you say from checking that you have done whether or not the overpayments we represent to have been made in II, III, IV, and V were overpayments?

A. I say that the payments made for the employees were those rates submitted to us by Duque

(Testimony of George J. Popovich.)

& Frazzini, and if an employee was borrowed from us he was charged the same rate of pay that we paid everybody.

Q. Mr. Popovich, you stated under direct examination that you took care of all the insurance for Basich Brothers in connection with this job at Tucson, is that correct? A. Yes, sir.

Q. Did you arrange for the compensation insurance?

A. Yes, sir, we had a policy in force, and we deposited with that I think approximately \$10,000.00.

Q. Do you have that policy in court today?

Mr. Monteleone: I think the clerk has it. That was left with the court, Mr. McCall.

Q. (By Mr. McCall): I will ask you, Mr. Popovich, if you are familiar with the insurance policy of compensation on this job?

A. I am familiar with it to the extent that we were covered for all operations.

Q. That is Exhibit 19. Can you state to the court, without looking at the exhibit, if it contains the name of Duque & Frazzini as subcontractors?

A. Schedule XIX?

Q. No, Exhibit 19. Mr. Clerk, do you have Exhibit 19?

Mr. Monteleone: I think the exhibit speaks for itself, Mr. McCall.

The Court: I think the documents speak for themselves. I think it will be conceded that the name does not appear.

Mr. McCall: All right.

(Testimony of George J. Popovich.)

Q. Beginning with Schedule No. VII of your Bill of Particulars, Mr. Popovich, Equipment Rentals, you testified this morning that those schedules were made up—Schedule No. VII was made up by equipment time cards signed by each employer.

Mr. Monteleone: Each employee.

A. By each employee.

Q. (By Mr. McCall): And the time cards signed by him and the foreman. Do you have in court all the time cards making up Schedule No. VII?

A. I don't have all the time cards here at all, sir.

Q. Do you have any time cards from which you made up Schedule No. VII?

A. Not with us here.

Q. Then beginning with No. VII to No. XLIV, all of your testimony with reference to this equipment being used on the subcontract only was from information given to you by someone else, and not from your own personal knowledge, was it not?

A. From the records, sir.

Q. And from what records?

A. From books of original entry, paid invoices, time cards.

Q. When you refer to books of original entry, you refer to the record sent to you prepared by Basich Brothers on the work, is that right?

A. The records submitted by them to us, and

(Testimony of George J. Popovich.)

also records submitted by the office. The job controls are kept in the home office.

Q. Then you were never on the job at Tucson, the original job, or the subcontract job, were you?

A. I never was on the job, sir.

Q. In connection with all of this equipment rental, did you have any contract signed by Duque & Frazzini, or anyone in their behalf, for the equipment?

A. The only record that I have of this particular equipment is where Mr. Frazzini called me on the telephone and asked me to obtain some for him, and I made arrangements, sir, so as to get such as the power unit, and various parts that he was unable to obtain, and asked me to get for him.

Q. That's the only equipment or supplies that you know about of your own knowledge?

A. That is of direct knowledge, yes, sir.

Q. In what schedules are those particular items covered?

A. Well, sir, we have in Schedule—I can give you a few here. That schedule calls for equipment rentals; that shows Bressi & Bevanda, Industrial Equipment Company—that is Schedule No. XIII. Mr. Frazzini asked me to rent this power unit, and we made arrangements to do so.

Also on Schedule XIV, Industrial Equipment Company, he has asked me to rent a power unit. We also did that. Then we have other items, consisting of screens used in connection with the Pioneer Crushing plant—this small crushing plant. He

(Testimony of George J. Popovich.)

was unable to obtain certain supplies or screens, and requested me to purchase those for him.

Q. What schedule is that mentioned in?

A. That is Schedule—here is the one here, for Axman-Miller Construction Company. I rented that. That is Schedule No. XXV.

Schedule No. XXVII, I also purchased various screens for him, and if I am not mistaken this belting—he was unable to get conveyor belting.

Q. So far as you know then there was no written agreement between Basich Brothers and Duque & Frazzini with reference to the rental of any equipment whatever, is that right?

A. That was a written agreement. We have had a lot of oral agreements. Do you have reference to written agreements?

Q. Yes. Mr. Popovich, do you know of any written agreement between Basich Brothers Construction Company, the plaintiff, and Duque & Frazzini with reference to the rental of the equipment mentioned in any of these schedules?

A. Yes, agreements that were drawn up. I would not have any knowledge here, unless the field office has knowledge where direct contracts were made, but the data that I made—I would talk to him on the telephone before shipping the equipment over to him. I would ask for his personal O.K., and he would say to ship it either in a truck, or by some carrier.

Q. Outside of these two items, you know noth-

(Testimony of George J. Popovich.)

ing about any equipment, you testified to this morning? A. Outside of the record.

Q. I call your attention to Schedule IX, Mr. Popovich. Will you look at page 30 of your comments on the Bill of Particulars. On page 30 of the comments on the Bill of Particulars——

A. Page 30, on Schedule IX?

Q. With reference to Schedule IX, where the following statement is made:

“This Schedule shows royalty charges for sand production on the basis of 995 tons. Schedule XVII shows royalty charges for sand production on the basis of 2,223 tons, a total of 3,218 tons of sand. The credit allowed for sand production in Schedule XXXIV (XLIV), however, is 751 tons of sand.”

A. Yes, the rental of the Pioneer Crushing plant and the hot plant was made by Duque & Frazzini and Mr. N. L. Basich on royalty leases for a sand production basis of 995 tons, on Schedule IX. Schedule XVII shows royalty charges for sand production on the basis of 2,223 tons, a total of 3,218 tons. Of this amount, 751 tons of sand was used by us for Seal Coat, and concrete aggregate, mineral aggregate, of which there was that item credited as given in Schedule XXXIV for Seal Coat sand. The other sand was used for mineral aggregate and concrete aggregate.

Q. You stated that you charged a royalty of 10 cents per ton on the Pioneer Crushing machine, in Schedule IX, is that correct?

(Testimony of George J. Popovich.)

A. On the Pioneer for mineral aggregate.

Q. That is on Schedule IX of your Bill of Particulars?

A. According to Mr. N. L. Basich on an agreement with Duque & Frazzini, we were to charge them 10 cents a ton.

Q. Do you have any place the number of tons which you charged them with?

A. Do you mean the grand total for Pioneer?

Q. Yes.

A. I don't have it. I would have to compute that.

Q. Do you know then where the information was gotten from to make that Schedule No. IX?

A. From records submitted by our engineers, and also our engineers' computations-with the U. S. engineers' estimate.

Q. Do you have those records before you?

A. I don't have those records. They were compiled—we have those at the office. Our engineers would check the others engineers' records.

Q. I call your attention to Schedule XXX of your Bill of Particulars, Miscellaneous Labor, Invoices, and so forth, February 26, 1945, to June 16, 1945, \$2,814.24, and I will ask you from what information did you make this schedule?

A. Do you mean Schedule XXX? Shall I take each one separately?

Q. Just state to the court the information from which you made up Schedule No. XXX. It says "Move & Set Up Pioneer."

(Testimony of George J. Popovich.)

A. Those records were obtained from our time cards.

Q. Do you have them before you in court?

A. We don't have all the time cards here, sir. They were made up of time cards and weekly payroll sheets presented to us by Duque & Frazzini.

Q. You say that Duque & Frazzini submitted to you time cards and weekly payroll sheets from which you made up Schedule XXX?

A. Yes, plus—well, I see J. G. North here. We also took invoices paid to J. G. North into consideration, and I notice it says Tucson Machine & Engineering. We also took into consideration the invoices paid by us.

Q. Beginning with Item 2/26/45, page 1 of your Schedule XXX, in the amount of \$33.69, can you tell how that labor is made up? A. \$33.69?

Q. Yes.

A. We can tell that by our time cards, and other records we don't have here available.

Q. Do you have any records available in court today from which you made up Schedule No. XXX?

A. We don't have all the records here.

Q. Do you have any of them here?

A. No, we would have to have our work papers to compute that.

Q. Mr. Popovich, do you know why you left out all the names of the men who you have charged to Duque & Frazzini on Schedule XXX?

A. No reason at all, sir. We can supply the names.

(Testimony of George J. Popovich.)

Q. On the other schedules you include the names of workmen, but on Schedule XXX, for some reason they were left out.

A. We have no reason at all.

Q. As a matter of fact this Schedule XXX was all made up of the plaintiff's own employees, was it not?

A. The plaintiff's own employees? This was all Duque & Frazzini's employees.

Q. And plaintiff's employees were not working on Schedule XXX, is that right?

A. You stated the plaintiffs were not working on Schedule XXX. They are all the defendants' employees.

Q. Will you submit to the court tomorrow morning when you return the names of the employees on the first page of Schedule XXX?

A. Yes, sir, we will bring all our records here.

Mr. Monteleone: Mr. McCall, there are four boxes of them. We will be willing to bring the four boxes of daily payroll records.

Mr. McCall: Of course, we are not asking you to do such a job as that, but I would like to see if the plaintiff can produce the names of the men making up Schedule XXX, if plaintiff still contends they were not his employees.

A. We will have to go back to the office and work on this tonight, and obtain all this information.

Q. Mr. Popovich, as a matter of fact, this Schedule XXX, all these items on the first page of Schedule XXX were incurred by the plaintiff

(Testimony of George J. Popovich.)

Basich Brothers Construction Company for the setting up of the Pioneer Crusher, were they not?

A. This was all incurred by Duque & Frazzini. These were Duque & Frazzini's employees, setting the crusher up.

Q. Did you prepare this Schedule XXX yourself? A. No, sir.

Q. Do you know what is mean by "move & set up Pioneer"? A. Yes, sir.

Q. What is meant by "move—"

Mr. Monteleone: As used in the Bill of Particulars, is that right?

Mr. McCall: Yes.

A. They mean by that, suppose you have your equipment spotted in one place, and you want to move it say 200 or 250 feet; that is considered a part of a move. Setting up means taking two sections of the Pioneer plant built together, and setting up all the conveyors there, both the primary crusher and the roll crusher.

Q. I believe you testified this morning that you prepared the subcontract in this case.

A. Yes, sir, I did, with Duque & Frazzini.

Q. I call your attention to Article XXII of the subcontract—I beg your pardon, it is Article XII, entitled: Completion Work by Contractor, which reads in part:

"In the event Basich Brothers Construction Co. plant is used, moving in and moving out expense will be paid by Basich Brothers Construction Co."

(Testimony of George J. Popovich.)

A. He talked with Mr. Basich in regard to that matter. I was present.

Mr. McCall: I move that the answer be stricken as not responsive to the question.

The Court: You had better answer the question.

Mr. McCall: Will you read the question to him, please?

(Question read by the reporter.)

A. By that we meant the cost of transporting the equipment from Alhambra to Tucson, and back, was to be paid by Basich Brothers Construction Company.

Q. I call your attention, Mr. Popovich, to your Schedule XXXVI.

A. Yes, sir. On Schedule XXXVI the insurance charge was computed as follows: Computation per 100, by Code 5546, was \$4.60; Federal and Arizona Unemployment Insurance Excise Tax, \$4.00; a total of \$8.67 per hundred. No charge was made for public liability and property damage, because the truck drivers are insured under the truck owner's contract policy, and therefore P.L. and P. D. was not charged.

Q. You did have P.L. and P.D. charged until you received this statement which we are looking at now, did you not?

A. What statement did you have reference to, sir?

Q. Comments on the Bill of Particulars.

A. On your Bill of Particulars you state:

(Testimony of George J. Popovich.)

“Plaintiff has not exhibited to defendant evidence of authority for the rating used in computing Workmen’s Compensation Charges.” I notice the charge on insurance on labor is \$2103.75 at 8.67 per 100. If I understand you correctly, I just give you the breakdown of how we arrived *at of* \$8.67 per 100.

Q. On Schedule No. XXXVI—do you have that before you? A. Yes.

Q. Date 6-7-45, Move & Set Up P.D.O.C. plant, \$2,500.00, invoice. A. Yes, sir.

Q. Was this ordered by Duque & Frazzini?

A. I have no knowledge of that, sir. Our records show that the invoice shows \$2,500.00 charged and chargeable to Duque & Frazzini.

Q. Do you have any other information on that \$2,500.00, in a breakdown other than invoice?

A. Mr. N. L. Basich made the deal on that.

Q. You have no personal knowledge about it?

A. No, I just have what we paid him, and it was charged accordingly, per our records.

Q. Then I call your attention to Schedule XXXIX. Do you have that Schedule XXXIX of your Bill of Particulars before you?

A. Yes, sir.

Q. Do you have the defendant’s comments on page 36 before you, Mr. Popovich?

A. Yes, sir.

Q. Will you read Article XXII, Item 11, of the alleged subcontract?

A. Under what schedule?

Q. This is under Schedule XXXIX.

A. All right.

(Testimony of George J. Popovich.)

Q. No. XXXIX. Then I call your attention to subcontract, Item 11, Article XXIII, which reads in part: "Measurement to be computed on truck water level." Then in your schedule you have "Measure for purposes of credit to Duque & Frazzini is made by this schedule dividing square yards in place by 15." Can you tell the court why Schedule XXXIX does not give credit according to Item 11, Article XXIII of the subcontract?

A. To verify these figures in Schedule XXXIX, they were made up by our engineers using quantities, and also checking the engineers' measurement, that is, the P.D.O.C. estimate, and of Mr. N. L. Basich. Mr. Mitchell is the engineer. The P.D.O.C. estimate was used to compile these figures.

Q. I call your attention to Article XXIII of the subcontract, and Item 11, which provides that the measurements will be computed on truck water level, and Schedule XXXIX shows that the computation was on square yards. Can you tell why that was changed?

A. Mr. N. L. Basich will tell. I do not know why it was changed.

Mr. McCall: That is all.

Redirect Examination

By Mr. Monteleone:

Q. Mr. Popovich, in preparing your Bill of Particulars you stated that you had used daily payroll records that were furnished to you by Duque & Frazzini, and also weekly payroll records. Now,

(Testimony of George J. Popovich.)

did you duplicate the daily and weekly in arriving at it, or did you segregate each one?

A. We segregated each one, and took them into consideration so no double payment would result.

Q. How many boxes of daily payroll records do you have in connection with the Duque & Frazzini job?

A. Homer Thompson, my office man, bunched them all together. I imagine there are three or four there.

Q. During the investigation were those records shown to the auditor of the Glens Falls Indemnity Company?

A. Yes, they were available to him. He spent several weeks in our office. We gave him everything he asked for.

Q. With reference to Workmen's Compensation policy, I understand you had a discussion with Mr. Frazzini before the subcontract was signed?

A. Yes.

Q. If Duque & Frazzini had to make their own Workmen's Compensation payment, would they have been required to make a deposit with the State?

A. Yes.

Q. But you already had taken care of that for him?

A. Yes, we deposited \$10,000.00.

Q. That was previous to this time?

A. Yes, and Mr. Hutchinson, the auditor, verified the record; went over it with our office, and also with Homer Thompson.

Q. So you were saving money and expense to

(Testimony of George J. Popovich.)

Duque & Frazzini by accommodating them with the Workmen's Compensation?

Mr. McCall: I object to that as calling for a conclusion.

The Court: Overruled.

Q. (By Mr. Monteleone): Is that a fact?

A. Yes, that was in accordance with our agreement under the contract.

Q. You were helping them out and saving them money by doing so, is that right?

A. Yes; it was mentioned that they were unable to take care of labor and insurance, and asked us to do it. So far as the other items are concerned, they said they were financially competent to do that. That was the reason we inserted the special provision about labor and all the insurance.

Q. Had they been required to pay their own workmen's compensation, would the State have required them to make a deposit?

A. They always required it of us and foreign companies, who had never worked in Arizona before.

Q. Who paid that deposit?

A. We paid the \$10,000.00.

Q. Mr. Popovich, was it customary among contractors in construction work for the general contractor to procure supplies or equipment for the subcontractor, and then charge the same against the subcontractor?

A. Yes, that is done quite frequently. It is purely an accommodation extended to them.

(Testimony of George J. Popovich.)

Q. In connection with Schedule XXX, in connection with moving in and moving out of the Pioneer plant, did you make any charge in the Bill of Particulars for the expense of moving in and moving out the Pioneer plant? A. No.

Q. When you referred to moving the Pioneer plant, in your Bill of Particulars, what expense were you referring to?

A. Miscellaneous moving, and assembling the whole plant. We brought the plant in in several truck loads, and put the plant in one place. They agreed to go ahead and move it around, and adjust it, and assemble it. That is called moving and set-up. That is a general term used in construction.

Q. In other words, during the operations of Duque & Frazzini this plant has been moved from one point to the other point, and put up again?

A. Yes.

Q. The items referred to in that Bill of Particulars have reference in connection with charges by Duque & Frazzini in connection with their operations? A. That's right.

Mr. Monteleone: That is all.

Mr. McCall: No further questions.

Mr. Monteleone: Mr. McCall, do you want us to bring in the payroll records tomorrow?

Mr. McCall: I am not stating to the plaintiff what records to show.

The Court: I think to be safe, in order to make my ruling correct, you should bring in everything that you have. If you have a truck load, I will give

(Testimony of George J. Popovich.)

you special permission to bring them in here. If you can show that you have them here, then the rule is complied with.

Mr. Monteleone: We will bring them in tomorrow.

The Court: I am doing that to save Mr. McCall the embarrassment of having to stipulate to anything he might not wish to, and that is in no way a criticism.

(Whereupon, an adjournment was taken until Wednesday, February 5, 1947, at 10:00 o'clock a.m.)

Los Angeles, California

Wednesday, February 5, 1947, 10:00 a.m.

Mr. Monteleone: May the record show, if the Court please, that the plaintiff has brought into court eight boxes of records kept by the plaintiff in connection with this particular job involved, to which the witness George Popovich referred in his testimony yesterday, and that they are available to the court or to the defendant.

The Court: All right.

Mr. McCall: May it please the court, to clarify the position of the defendant, and possibly save more time, it is not our position that the payments alleged here were not made. It is only our position that the defendant is not liable for the amounts paid for various reasons, which we have shown, or can show. We admit they made payments, but,

because they were premature, and for other reasons the defendant is not liable.

The Court: You have required them to meet the burden of showing they actually made them, in addition to the proof, which has taken a full day. Now, they may as well complete whatever showing they desire to make. Had you admitted they were made, and merely questioned the validity, we would have saved a day yesterday. I don't think there is an admission in the record. This case, unfortunately, because it went before three judges, left the record in an unsatisfactory fashion. When I conclude the taking of the testimony that will be the end, and it will not be reopened by me. In other words, there will not be one item as to which there is no stipulation, or as to which proof does not exist in the record. Proceed with your proof.

BART C. WOOLUMS

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

A. Bart C. Woolums.

Direct Examination

By Mr. Monteleone:

Q. Mr. Woolums, where do you reside?

A. Los Angeles.

Q. What is your business or occupation?

A. Construction superintendent.

(Testimony of Bart C. Woolums.)

Q. Were you connected in any way with the construction of the Davis-Monthan Air Base near Tucson?

A. Yes, I represented the government as the resident engineer.

Q. During what period of time did you represent the government in that capacity?

A. About five years.

Q. Commencing when, up to what time?

A. I started in 1941 and finished in 1946.

Q. What was the nature of that construction work?

A. At Tucson, do you mean?

Q. Yes.

A. It was paving runways, drainage.

Q. What was the general purpose of that construction? For what was it to be used?

A. To strengthen the runways for the larger bombers.

Q. While you were there did you come to know Mr. Carson Frazzini, and Mr. Duque, his partner?

A. Yes, I met the gentlemen.

Q. Mr. George Popovich? A. Yes.

Q. And N. L. Basich? A. Yes.

Q. Did you have occasion to visit the pit site where the material was being produced, during the year 1945, for this bomber base? A. Yes.

Q. How often did you visit the site?

A. I imagine once every day.

Q. In his deposition, Mr. Carson Frazzini made a statement that you and Mr. Popovich, about May 19 ordered that he not remove material from a cer-

(Testimony of Bart C. Woolums.)

tain site that he was prospecting. Bearing that in mind, do you recall having been at the pit site about that time? A. Yes, sir.

Q. Who were present at the time?

A. Well, Mr. Gollob.

Q. Who is Mr. Gollob?

A. Mr. Gollob is the owner of the pit, of the property. George Kovick and Harold Sloniger, and myself.

Q. Who is Mr. Sloniger?

A. Mr. Sloniger represented me in the field.

Q. Was Mr. Duque or Mr. Frazzini there? Were they present also at the time? A. Yes, sir.

Q. Was Mr. Kovick there?

A. Mr. Kovick was there.

Q. State what was said or done at that time in connection with that matter?

A. I was called down, due to the scarcity of material. The Basich Construction Company had to find more material. I say they had to find more material, because they were the general contractor, and Duque & Frazzini were the subcontractors, over which I have no control.

Mr. Gollob had a house practically built on the highway, and they had already, in years previous, had a pit at the site of his property, running parallel to the back of it. I remember this particular day I was called down, and Duque & Frazzini wanted to turn abruptly, and go behind the man's barn and his house, to get the material.

(Testimony of Bart C. Woolums.)

Mr. Gollob said to me—in years previous I had contacted him, and he told me he would help the government in any way he could to produce material for the runways for the Davis-Monthan Field. He said, “I would rather they tear up my back yard, and not my house.” I agreed with him that the man had done everything in his power to help the government, and also the contractors, and I don’t see how he could allow them to destroy his home.

Mr. McCall: I object to that, may it please the Court, as assuming a fact not in evidence. There is no evidence before the court that they were trying to destroy the man’s back yard.

Mr. Monteleone: This is what you told Mr. Frazzini at the time, as said by Mr. Gollob?

A. That’s right. I said as far as my part, representing the government, I have no part in it.

The Court: Objection overruled.

Q. (By Mr. Monteleone): Did Mr. Kovick make any comment at the time that you recall?

A. Mr. Kovick said that he was of about the same opinion. There were other materials available, which were further away.

Q. Did you or Mr. Kovick tell Mr. Frazzini, or Mr. Duque, that they could not remove material from the site where they were standing—remove the material?

A. No, sir.

Q. The only one who objected to that was Mr. Gollob, is that correct?

A. That’s right.

Q. In connection with the measurement of ma-

(Testimony of Bart C. Woolums.)

terial used in connection with this government job, was that under your general supervision, in determining the quantity?

A. Yes, sir, to make payments for the government, we had to take a field party to the cross sections and compute it for quantity.

Q. How was that done?

A. I had my field party. They went out and took all the necessary measurements, and came back to my office, and turned it over to my office engineer. He would compute the quantities which we would submit to the general contractor.

Q. Did the general contractor also have an engineer to make their own computations?

A. Yes.

Q. Were these computations made in the ordinary course of business? A. Yes.

Q. From your observation, and your supervision, were they accurately made, so far as humanly possible? A. Yes.

Q. They were made in the regular manner of making measurements, is that correct?

A. Yes.

Q. While you were at the pit, during the progress of the work, did you ever hear George Kovick, or anyone connected with Basich Brothers, ever give Duque & Frazzini orders, or direct how they should operate their plant, or their operations?

A. No, sir; that was none of my business.

Mr. Monteleone: That is all.

(Testimony of Bart C. Woolums.)

Cross-Examination

By Mr. McCall:

Q. Would the reporter please read the last question counsel asked, and the answer?

(Record read by the reporter.)

Mr. Woolums, were you at the pit on the 19th day of May, 1945? A. Yes, sir.

Q. What time were you at the pit on that day?

A. I would say it was about 11:00 o'clock.

Q. Was Mr. Kovick and Mr. Albino present at that time?

A. Albino, no, sir. Mr. Kovick was.

Q. Did you hear Mr. Kovick countermand the order to Mr. Frazzini, and instruct the men to go back to work on the Pioneer Crusher?

A. No, sir.

Q. You do not know whether he did that on the 19th of May or not?

A. I couldn't tell you.

Q. What were you doing at the pit on the 19th of May, about 11:00 o'clock?

A. Mr. Gollob sent my inspector after me, and wanted to explain to me why he could not allow them to use this particular material, because two years previous I went to Mr. Gollobs and had him give the contractors, previous to this job, permission to use his materials. Naturally, he looked to me for someone to tell his troubles to.

(Testimony of Bart C. Woolums.)

Q. Did he tell you that Duque & Frazzini wanted to move the plant over closer to his house?

A. It was not a case of plant moving; just a case of taking materials.

Q. How did they go about taking materials, by truck or shovel? A. Shovels and trucks.

Q. Had they moved the shovels and trucks and started taking the material closer to his house?

A. Well, I think the shovel was across the street. It's impossible to say, because I don't keep that much of a record of it.

Q. How far was the gravel that you understood they wanted to take from his house?

A. How far was it from where?

Q. From Mr. Gollob's house?

A. It would run right up to within 50 feet of his house.

Q. Who told you it would run up that close?

A. Because as I said previously, with two years' experience I knew the pit pretty well. That was the only place to take that material from behind his house. We had stopped the previous contractors from going back behind his property. They had to run parallel with the river.

Q. Was Mr. Duque, or Mr. Frazzini there that morning? A. Which morning was that?

Q. May 19th, the time you are talking about.

A. Mr. Frazzini was there.

Q. He was there at the time you were there?

A. Yes.

Q. That was about 11:00 o'clock?

(Testimony of Bart C. Woolums.)

A. I would say it was, in the morning, yes.

Q. Had the Pioneer plant shut down at that time?

A. That I don't know.

Q. Were you at the Pioneer plant?

A. The Pioneer plant was sitting at the pit, but that was none of my jurisdiction.

Q. Was it operating at that time?

A. That I couldn't say.

Q. Did you hear any dispute between Mr. Frazzini and Mr. Kovick about whether or not the Pioneer plant would continue to run that day?

A. No, sir.

Q. Mr. Woolums, can you state to the court now definitely that Mr. Frazzini was at the pit on Saturday morning, May 19, 1945, when you say you were there?

A. Well, I can't quote dates, because I took no record of the date; but, as I said previously, we had this meeting on or about that time.

Q. You say you were in the pit on an average of once a day while you were on the job?

A. Yes, sir.

Q. What were you doing in the pit once a day?

A. I supervised all the construction. I went down to contact my two field men. I had two field inspectors inspecting the material; how it was crushed; how it was delivered.

Q. When was the first day that you went to the pit?

A. I went to the pit every day of the job.

Q. When did the job start?

A. I can't give you the correct date.

(Testimony of Bart C. Woolums.)

Q. Just approximately, according to your recollection.

A. It must have started sometime in February or March. I couldn't tell you without looking it up.

Q. In 1945? Do you know what date in February or March, 1945, the first material was produced?

A. No, sir.

Q. And every day that you were in the pit, did you see Mr. Kovick?

A. No, sir.

Q. Did you ever see him in the pit?

A. Yes, sir.

Q. How often?

A. Off and on at intervals I would happen to meet him, or I wouldn't happen to meet him—I might be down there, or he might be up in the field.

Q. Were you in the pit at any particular time of the day each day?

A. No; whenever it was my convenience to go down.

Q. Did you ever see the subcontract between Basich Brothers Construction Company and Duque & Frazzini?

A. No, sir.

Q. You know nothing about that.

A. I know nothing about it.

Mr. McCall: That is all.

(Testimony of Bart C. Woolums.)

Redirect Examination

By Mr. Monteleone:

Q. Mr. Woolums, do you recall writing a letter to Basich Brothers, dated June 7, 1945, a copy of which has been introduced in evidence in this matter, in reference to the production of material?

Mr. McCall: We will stipulate that the letter that plaintiff has, purporting to be from Mr. Woolums, as an exhibit, was from him.

Q. (By Mr. Monteleone): Do you recall writing that letter?

A. Yes, I believe I wrote three or four letters to Basich Brothers.

Q. This one is dated—may I refer to my copy, Mr. McCall? It is an exact copy.

Mr. McCall: No objection.

Q. (By Mr. Monteleone): I show you what appears to be a copy of a letter dated June 7, 1945, to Basich Brothers Construction Company, attention Mr. G. W. Kovick, and at the bottom signed B. C. Woolums, resident engineer, and ask you to glance over that letter.

A. Yes, sir.

Q. To the best of your knowledge were the statements made in this letter correct and accurate facts?

A. We kept a daily log of everything, and we wrote these letters from our office records.

Q. To the best of your knowledge, the facts were correctly stated in that?

A. Yes.

Mr. Monteleone: That is all.

Mr. McCall: No further questions.

Mr. Monteleone: Mr. Basich, take the stand.

NICKOLA L. BASICH

called as a witness by and on behalf of the plaintiffs, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Monteleone:

Q. Mr. Basich, you are a party, who gave your deposition in connection with this matter, which has heretofore been filed, is that correct? A. Yes.

Q. I will try and not ask you any questions in connection with matters covered by your deposition, but in connection with other matters. When Mr. Frazzini came to your office, shortly prior to signing the contract of February 7, 1945, did you have any discussion with him about this man Paul Albino? A. Yes.

Q. State what was said in connection with it at that time.

A. Yes, we talked about Albino. We told him we had the plant, and we were willing to pay freight and back.

Q. What plant are you referring to?

A. The Pioneer. Pay the freight forth and back, free of charge, for him to take care of everything at a reasonable rate. I told him this plant cost \$40,000.00, and I would like to have a good experienced man to run it, a very good one. He says, "I don't have any."

(Testimony of Nickola L. Basich.)

I told him, "We have a man that ran this plant off and on. I would like to have him on the plant if it is possible, if he is available."

He told me, he said, "I will be glad to have him, because we haven't got anybody."

Q. At that time was Paul Albino in your employ? A. No.

Q. Was he on your payroll at that time?

A. No.

Q. Later on, after the contract was signed between you and Duque & Frazzini, did Frazzini have any further conversation with you concerning Paul Albino?

A. Yes, I think about the 3rd or 4th of February Mr. Frazzini asked me if I got in touch with Mr. Albino; if he was available.

Q. What did you tell him?

A. I told him we located through our Social Security where he was, and we wrote him a letter, but we have not got an answer at that time.

Q. Did you at any time tell Mr. Frazzini or Mr. Duque that they could not rent this Pioneer plant from you until they hired Mr. Albino?

A. No.

Q. Did you at any time, while Albino was working in connection with the operations of Duque & Frazzini, give Albino, or anyone else, any orders or directions? A. No.

Q. Do you know of your own knowledge whether anybody connected with the Basich Brothers ever gave Albino any directions as to how to operate that

(Testimony of Nickola L. Basich.)

plant while he was working for Duque & Frazzini?

A. No.

Q. Did Basich Brothers have anyone, while the Pioneer plant was being operated by Albino, to supervise those operations? A. No.

Q. I understand you and Duque & Frazzini agreed upon a rental basis of 10 cents a ton, is that correct? A. Yes.

Q. What did the Pioneer plant consist of when this arrangement of 10 cents a ton was entered into?

A. It consisted of the plant itself, which consisted of the crusher, 10 by 36, rolls 20 by 48; screens, bins, and all odds and ends; feed conveyor, that feeds the plant, return conveyor, finished products conveyor, and waste conveyor, and a bunker.

Q. Did Duque & Frazzini later on rent from Basich Brothers any additional bins and screens?

A. Yes.

Q. That was a separate transaction?

A. Yes.

Q. What was the condition of this Pioneer plant when it was first turned over to Duque & Frazzini, so far as rolls and other parts were concerned? A. Completely built.

Q. In good condition? A. A-1.

Q. Later on there were repairs and replacements put on the Pioneer plant while it was being operated in the production of materials as specified in the subcontract of date February 7, 1945, which

(Testimony of Nickola L. Basich.)

it set forth in the bill of particulars. Are you familiar with those items? A. Yes.

Q. In your opinion were those repairs and replacements made necessary by reason of this operation in producing this material? A. Yes.

Q. In your opinion were the charges made reasonable charges for these repairs? A. Yes.

Q. In connection with the rollers or crushers, what effect did the operation have on that matter?

A. The roller crusher and jar crusher is used in the making of little rocks out of big ones. They wear out. The crusher consists of rolls, one roller corrugated, and one is flat, and every couple of weeks after they are new, or three weeks, it all depends on the hardness of the rock, you have got to build them up, or put in new rolls, because they become cut and smooth, and they won't crush.

Q. In connection with the Bill of Particulars it shows that during the course of time that material was being produced, as specified in the subcontract of February 7, 1945, continuing even after Duque & Frazzini left the job. Were these repairs and replacements therein specified necessary in order to produce the materials so specified in the subcontract?

A. Yes, they were more necessary than before, because the plant was worn out, and required some more repairs.

Q. That condition was brought on by reason of the operation in producing this material, which required repairs? A. That's right.

(Testimony of Nickola L. Basich.)

Q. Were those—any of those used by Duque & Frazzini in connection with their operations?

A. Yes.

Q. Following that, after Duque & Frazzini pulled off the job, on or about June 8, 1945, the Bill of Particulars shows a list of expenses incurred in connection with the production of materials set forth in the subcontract of February 7, 1945, consisting of rental of equipments and other items, repair of equipments. Were those items so specified, in your opinion reasonably necessary in order to produce the material? A. Yes.

Q. Were they actually used in the production of this material? A. Yes.

Q. In your opinion were those expenses reasonable charges? A. Yes.

Q. Mr. Basich, after Duque & Frazzini ceased to produce material, and you produced material, were you able to buy material from any source, to take the place of the material specified in the subcontract, at a cheaper amount than it cost to produce it as shown in the Bill of Particulars?

A. No, we tried to get products. They were sky high. I am sure we tried. The first trip of Mr. Bray in Tucson, I told him what the material cost us brought in from the outside.

Q. In other words, your operation was cheaper than you could purchase material? A. Yes.

Q. Were you able to arrange for the production

(Testimony of Nickola L. Basich.)

of that material through any other means, aside from the means you adopted?

A. Not for the same cost.

Q. In other words, it would have cost you more to make other arrangements, is that correct?

A. Yes.

Q. Can you explain why it is that the Bill of Particulars shows that the cost amounted to more than the amount of production?

A. On the operations from June 9th?

Q. Yes.

A. In the first place, the plant was worn out, and you can check through the Bill of Particulars and see it takes more parts for the plant, for upkeep, and more money for upkeep, and a less production.

Second, when Duque & Frazzini pulled off they left us high and dry. We had to get the equipment there. You can see in the Bill of Particulars we paid 17½ cents truck measure for the P.D.O.C. plant, and our plant, the Pioneer, we charged 10 cents a ton. In the P.D.O.C. plant there is rock, dirt, and sand, whatever comes. It was measured. On the Pioneer plant there was nothing but pure rock to be crushed.

Q. In your opinion were the operations carried on after Duque & Frazzini pulled out in as efficient and economical manner as it was physically possible to do so?

A. The best that could be done.

(Testimony of Nickola L. Basich.)

Q. What happened when Duque & Frazzini pulled off of that job, Mr. Basich?

A. I wasn't that day on the job.

Q. Did they talk to you before they pulled off the job? A. No.

Q. Did they remove all of their equipment from the job?

A. All of the equipment, except two electric motors, which were operating the screens, on the Pioneer plant.

Q. Going back to this Pioneer plant that you installed, had you discussed the matter with Duque & Frazzini and Mr. Bray, the Glens Falls agent?

A. The only time I discussed Duque & Frazzini was when I made the contract.

Q. I don't mean the Pioneer plant; I mean the P.D.O.C. plant?

A. Yes, sir, we discussed that the early part of May.

Q. With whom?

A. Mr. Bray, Mr. Frazzini, Mr. Duque, Eddie Earl.

Q. Who was Eddie Earl?

A. P.D.O.C.; and Mr. Kovich. Mr. Bray came in Tucson in the early part of May. He stopped at the Pioneer Hotel. I was staying at the Santa Rita. He called me. I asked Mr. Bray to come and have breakfast with me at the Santa Rita, which he did. He asked me if I was going out. I said yes, but I have no transportation, so he took me.

(Testimony of Nickola L. Basich.)

He took in Duque & Frazzini's office there, and later on he came into our office. He asked all the questions about the cost, and everything, which I told him just exactly what it was; that the cost is exceeding their production, and Mr. Bray and Homer Thompson, I am sure they spent two or three hours looking things over there. Mr. Bray stayed a couple of days. I told Mr. Bray, "Why don't you set up a plant? It is impossible for them to supply the material and finish the job in time, which was very urgent with the B 49 Base.

He asked me what could be done. He asked me if there was a plant in the neighborhood that could be got. I told him about the P.D.O.C. plant. He talked to Duque & Frazzini. He came back again, and he said to me, "Nick, they can continue with the work where they are. They owe around \$20,000.00 worth of bills, and they haven't got the money to pay them."

Q. Who told you that?

A. Mr. Bray. Then he asked if I couldn't advance them \$20,000.00 so that they could proceed and finish the job. I told Mr. Bray, "No, I can't advance the money, but I can rent them the plant and charge them, if satisfactory." So we checked in and got prices from Eddie Earl.

I don't think Bray was at the meeting at our office when Eddie Earl came. Then Duque & Frazzini came. I was there about an hour and a half. They gave us some prices, and when I left they were still talking.

(Testimony of Nickola L. Basich.)

When I got in the hotel I had my dinner. About 11:00 o'clock George called me up—George Kovick, and said, "Nick, when we left the office I tried to call you up, but I couldn't get you; your room did not answer. Later on, just a few minutes ago, Mr. Duque called, and he said, 'Yes, we will take that plant if you pay for the moving in and out, \$2,500.00.' "

I told George to call Duque and tell him I am not going to pay anything of the kind; it is up to them to produce the material, and get sufficient equipment to do so.

Q. Later on Basich Brothers made arrangements with P.D.O.C. for that plant?

A. Some arrangements.

Q. When was that plant put in operation, the P.D.O.C. plant?

A. The first part of June, around the 5th to the 8th; something like that.

Q. At that time had Duque & Frazzini been producing sufficient material for you to carry on your operations at the main base? A. No.

Q. Were you compelled to suspend your operations at any time at the main base because of lack of material being produced by Duque & Frazzini?

A. Yes.

Q. Do you know whether or not there were available material on the Gollob's property, aside from any material back of his barn, that could have been produced to carry on operations?

(Testimony of Nickola L. Basich.)

A. Sure, there was enough to supply another base like that.

Q. Did you take any material at the spot indicated by Mr. Wollums in his testimony, where he stated Duque & Frazzini wanted to move the material? A. No, I couldn't.

Q. Did you? A. No.

Q. Did you have any arrangement, or discussion, with Mr. Duque or Mr. Frazzini as to where he should not remove any material, before the contract was signed? A. Yes.

Q. What was said in that respect?

A. Mr. Frazzini came on the job first, which was around the 10th or 11th, whatever it was. I was on the job, and I took Mr. Frazzini on the property owned by Mr. Gollob, and told him how far he could go close to the house. There was a previous pit in there showing good rock on that side next to the house, which Mr. Gollob would not let me touch, and when he leased it he showed me how far I could go to get material. So I took Mr. Frazzini and showed him exactly the lines where Mr. Gollob agreed to let me have it. I told him he can't go outside of those lines.

Q. Was the point where Duque & Frazzini were planning to remove the material about May, 1945, beyond the line indicated? A. 150 feet.

Q. Beyond that line? A. That's right.

Q. Mr. Basich, have you had numerous conferences with Mr. John Bray of Glens Falls Indemnity Company, while Duque & Frazzini were operating?

(Testimony of Nickola L. Basich.)

A. I think that is in the deposition, except one time.

Q. You have to testify?

A. Yes, except one time Mr. Bray came in our office.

Q. When was that?

A. Oh, that was between the 20th and the 1st of May.

Q. The 15th or 20th of April?

A. And the 1st of May. Sometime in April. I don't know the time. He called up and wanted to come and talk to me about it, after he received the letter.

Q. He came to your office? A. Yes.

Q. What discussion did you have?

A. He asked me how things were going out there. I told him what I thought, and told him the best thing for them was to do something about it. He promised me he was going to take a look at it.

Q. After you had this meeting at your office, did you meet Mr. Bray at Tucson? A. Yes.

Q. How many days did he spend there?

A. Two or three days. It's in the deposition.

(Short recess.)

Q. (By Mr. Monteleone): Mr. Basich, during the operations of Duque & Frazzini did you or anyone connected with Basich Brothers, to your knowledge, ever hire or fire any of the men working on the Duque & Frazzini operations? A. No.

(Testimony of Nickola L. Basich.)

Q. Or did you, or any of your men, make any attempt to hire or fire any of these men?

A. No.

Q. Referring to Article XXIII, Item 11 of the subcontract of date February 7, 1945, Plaintiff's Exhibit 1, it is specified therein, 9,000 cubic yards of gravel for stabilized sub-grade under gravel base. It is already stated that measurements are to be computed on truck water level. Do you remember that provision? A. Yes.

Q. The measurements, so far as the Bill of Particulars shows, are according to cubic yards?

A. Yes.

Q. Will you state why it was measurement was made in connection with this item on the basis of cubic yards rather than truck water level?

A. Truck water level means the truck full of material. In the bunker you have a hole 12 inches by 12 inches, and you load the trucks which have a body consisting of 6 feet in width up to 7 feet in width, and a difference in length, and when you dump it in the middle you can have water level. So you have to have two men level the trucks up, and he has got to make a truck full, and for every truck full he gets paid for it, and Duque & Frazzini, they did not want to do it; they did not like to do it; and he asked could they be paid any other way. I told him yes, he could be paid the other way. The specifications call for 2 inches thick, which would be a benefit to him. There was more waste with 2 inches thick lying loose on the ground

(Testimony of Nickola L. Basich.)

than in the truck. Therefore, he gets the benefit of it; but it was such a small amount we were willing to pay that difference, if satisfactory, to save him money. There was at least a quarter to one-third he got paid for that never had been hauled to the job.

We had sections on that job which they called the turning apron, where the B 29 turned, consisting of 3 inch plant mix with 6 inch crusher or base, to be removed, and the dirt to be excavated for every runway. On these places we favored the crusher run as much as possible, and used it in connection with the 2 inch stabilized base, for which Duque & Frazzini got paid.

Q. Mr. Basich, the change in the measurement from water level to cubic yards was at the suggestion of Duque & Frazzini? A. That's right.

Q. It was for their benefit?

A. It was for their benefit.

Q. In your opinion were they given a greater amount or quantity by computing on a cubic yard basis than a water level basis? A. Yes.

Mr. Monteleone: That is all.

Cross-Examination

By Mr. McCall:

Q. Mr. Basich, you say that you had a conversation with Mr. Frazzini regarding the change in the calculation of this material mentioned in Article XXIII, Item 11 of the subcontract?

A. Yes.

(Testimony of Nickola L. Basich.)

Q. When did that conversation take place?

A. Oh, that conversation took place around the 23rd or 22nd; something like that; of February.

Q. The 23rd or 22nd of February, 1945?

A. Yes.

Q. And he agreed with you that he would change the calculation, and instead of paying on water truck level, that you would pay on another basis?

A. He wants me to save two men every day on the plant, plus one man making the trucks.

Q. So to that extent you and Mr. Frazzini changed the subcontract?

A. Well, we didn't change the subcontract at all; the measurements only.

Q. Did you ever keep a record of the truck loads as required by the subcontract, after that?

A. I don't know if they did or not.

Q. Now, Mr. Duque, if Mr. Frazzini stated in his deposition, reading from page 111, at line 23:

“Q. Well, I'll show you the schedule 39 in this Bill of Particulars, copy of which counsel has before him, and ask you if you had any contract or agreements with Basich Brothers after the signing of your subcontract to calculate that material otherwise than is stated in the subcontract.

“A. No, not to my knowledge.

“Q. You will note the subcontract calls for 40 cents a cubic yard and the material has been added up in square yards, and then re-

(Testimony of Nickola L. Basich.)

duced to cubic yards. Do you know on what basis, what reason that was done?

“A. No, I don’t.”

If Mr. Frazzini testified to that, do you still contend that you did have such an agreement with him as you mentioned? A. Surely.

The Court: Well, the fact remains, however, whether you did have an agreement, or did not, the settlement was made upon that basis?

The Witness: A different basis, yes.

Q. (By Mr. McCall): Then, Mr. Basich, you said something about Mr. Bray told you that Duque & Frazzini needed \$20,000.00 to continue. I did not understand all you said about that. Will you tell me again?

A. Mr. Bray told me that they needed \$20,000.00 to continue with the work and produce the material.

Q. When did this conversation take place?

A. The first part of May.

Q. Where was it?

A. At Tucson, at the Base.

Q. Who was present?

A. I don’t know if anybody was present.

Q. Did he tell you how he calculated Duque & Frazzini needed \$20,000.00?

A. Duque & Frazzini told him that they needed \$20,000.00.

Q. That is what he told you?

A. That is what he said. He told me that they owed \$10,000.00 to the bank in Reno.

No. 11658

United States
Circuit Court of Appeals
For the Ninth Circuit.

GLENS FALLS INDEMNITY COMPANY, a
Corporation,

Appellant,

vs.

BASICH BROTHERS CONSTRUCTION COM-
PANY, a Corporation,

Appellee.

Transcript of Record

In Two Volumes

Volume II

Pages 433 to 881

FILED

SEP - 10 1947

PAUL P. O'BRIEN,
CLERK

Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division



No. 11658

**United States
Circuit Court of Appeals**

For the Ninth Circuit.

**GLENS FALLS INDEMNITY COMPANY, a
Corporation,**

Appellant,

vs.

**BASICH BROTHERS CONSTRUCTION COM-
PANY, a Corporation,**

Appellee.

Transcript of Record

In Two Volumes

Volume II

Pages 433 to 881

**Upon Appeal from the District Court of the United States
for the Southern District of California
Central Division**

(Testimony of Nickola L. Basich.)

Q. On the P.D.O.C. crusher, which you mentioned this morning, did you have a contract with P.D.O.C. to install that crusher at the pit for the sum of \$2,500.00?

A. Yes; that's the deal that was made.

Q. When did you make that contract with P.D.O.C.?

A. Mr. Kovich made it the first part of June.

Q. Mr. Kovick made the deal? A. Yes.

Q. He made it the first of June?

Mr. Monteleone: He said the first part of June.

A. The first part of June.

Q. (By Mr. McCall): Did he at the same time make a contract to pay them so much per yard?

A. Yes.

Q. And before this contract was made did you take the question up with Duque & Frazzini?

A. No, with the exception that we wrote a letter to Duque & Frazzini and the bonding company, both.

Q. And did they write you a letter protesting?

A. Not at that time.

Q. So, at the time that you made the contract with P.D.O.C. for the crusher, about June 1st, Duque & Frazzini, so far as you knew, knew nothing about your putting it in?

A. We wrote them in the letter that we were going to move the plant in.

Mr. McCall: That is all.

Mr. Monteleone: I have Mr. Homer Thompson, the auditor, who actually kept the books at the

field office at Tucson, which would be merely a repetition of what Mr. Popovich said. I think in view of the statement of Mr. McCall, I will rest the case.

The Court: All right. Is there any additional testimony you desire to produce?

Mr. McCall: May it please the court, I would like to have just a few moments to consult with my associate as to whether I will introduce any.

The Court: All right.

(Short recess.)

Mr. McCall: I would like to call Mr. Vernon, please.

LAWRENCE H. VERNON

called as a witness by and on behalf of the defendant, having been first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

A. Lawrence H. Vernon.

Direct Examination

By Mr. McCall:

Q. What is your business?

Mr. Monteleone: I will stipulate that Mr. Vernon is an accountant, and he is the man who checked the records of Basich Brothers. He is a qualified accountant.

Q. (By Mr. McCall): Mr. Vernon, at my request did you check over the records out at the

(Testimony of Lawrence H. Vernon.)

office of Basich Brothers, the plaintiff here, in the light of the Bill of Particulars in court?

A. Yes, sir, Mr. McCall; I arrived there August 12, 1946.

Q. In your examination of those records, Mr. Vernon, did you check over all the payroll checks in connection with the subcontract with Duque & Frazzini?

A. Yes, sir, I have checked many of those. I couldn't say I checked all of them.

Q. And those checks, in payment of labor and material and supplies, were on whose check blanks?

A. On the check blanks of Basich Brothers Construction Company. The payroll checks were worded: Payroll Account on Job No. 19. The general account checks read: General Account—which paid for equipment and other items, besides payroll.

Q. Did you check other payroll checks made by Basich Brothers in connection with other work on this job, aside from the subcontract work?

A. Yes, sir, I did.

Q. What was the difference between those checks?

A. There was no difference whatever that I can see.

Q. Did you find any checks containing the name of Duque & Frazzini?

A. No, sir.

Q. Was there any notation on the checks that you saw that contained a statement as to what job it was on?

A. Only on the payroll it said: On Job No. 19,

(Testimony of Lawrence H. Vernon.)

which was the number of Basich Brothers in this Tucson job.

Q. Describe the checks for equipment rental.

A. They were on account of Basich Brothers Construction Company, general account. Both accounts were drawn on the Farmers & Merchants National of Los Angeles.

Q. Was there any notation on them showing Duque & Frazzini subcontractors?

A. None that I could find.

Q. Did you check copies of the withholding tax returns? A. Yes, sir.

Q. Describe those copies, as to who was employer and employee, to the court.

A. The copy read that Basich Brothers Construction Company was the employer, and it stated in the form, on the printed form, that the following names were employees of Basich Brothers Construction Company.

Q. Did you check the time cards which were mentioned here yesterday? A. Yes, sir.

Q. How many time cards, if you know, did you find?

A. When I first arrived on the job, on August 12, there were about 25 time cards handed to me as representing the employees of Duque & Frazzini, on Schedule No. I. Those time cards were on a form, printed Basich Brothers at the top.

Q. Did you ask about any other time cards?

A. Yes, sir, I did.

Q. Who did you ask?

(Testimony of Lawrence H. Vernon.)

A. I asked Mr. Homer Thompson, and I believe Mr. Popovich was present at that time also.

Q. What did they tell you about any other time cards?

A. They took me down to the basement of their building, and showed me about five or six large boxes of what they said were time cards in those boxes. They told me, before I started to examine them, that they were very badly disarranged as to chronological date, and as to employees, and all that sort of thing; that it would be a very long task to sort them out.

Q. Did you check the reports of Basich Brothers to the State of Arizona on employment insurance?

A. Yes, for the first and second quarters of 1945.

Q. Were they reported as employees of Duque & Frazzini, or Basich Brothers?

A. They were reported only as employees of Basich Brothers Construction Company.

Q. Did you check the Social Security returns to the Federal Government?

A. Yes, sir, for the first and second quarters of 1945.

Q. Were they reported as employees of Basich Brothers, or someone else?

A. They were reported as employees of Basich Brothers Construction Company.

Q. Did you check the reports regarding withholding tax returns? A. Yes, sir.

(Testimony of Lawrence H. Vernon.)

Q. Who signed as employer and employee there?

A. The employer was Basich Brothers Construction Company.

Q. Did you check vouchers showing payments for various equipments mentioned in the Bill of Particulars?

A. I checked about 75 per cent of all of them.

Q. Were those vouchers addressed and made out to Duque & Frazzini, or to someone else?

A. They were all made out to Basich Brothers Construction Company.

Mr. McCall: That is all.

Cross-Examination

By Mr. Monteleone:

Q. These vouchers you spoke of were vouchers from third parties sent to Basich Brothers, is that correct?

A. Yes, vendors' invoices.

Q. Then Basich Brothers sent vouchers to Duque & Frazzini, did they not, for the equipment mentioned in the voucher of the third parties?

A. I saw no such vouchers.

Q. You did not examine any?

A. No, sir.

Q. How many days or weeks did you remain at the job?

A. I was out to the office of Basich Brothers four weeks, from August 12th. Then I returned on two different days after that.

(Testimony of Lawrence H. Vernon.)

Q. They did not prevent you from seeing any of the records, did they?

A. No, sir; they treated me with every courtesy.

Q. They were placed at your disposal?

A. All I asked for, with the exception of the time cards. They showed me everything else I requested.

Q. In all of your examination you did not find any checks of Basich Brothers made payable directly to Duque & Frazzini, did you?

A. No, sir, I did not.

Q. All those checks that you noticed were made payable direct to the employee, isn't that true? They were named as the payees?

A. The payroll checks on payroll account were made to the employees.

Mr. Monteleone: That is all.

Mr. McCall: Nothing further. Defendant rests.

The Court: Let the record show that all the evidence has been closed. and that all the evidence relates to all the issues in the case, not only to the issue of liability, to which it was limited at the prior submission.

(Whereupon, an adjournment was taken until 2:00 o'clock p.m. for the purpose of argument.)

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 3rd day of April, A.D. 1947.

HENRY A. DEWING,
Official Reporter.

[Endorsed]: Filed May 16, 1947.

[Title of District Court and Cause.]

Hon. Leon R. Yankwich, Judge Presiding.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

(Partial)

February 5, 1947

Mr. McCall: You will note Mr. Woolums stated in his testimony that he was not there; Mr. Basich stated in his deposition that Mr. Woolums was there. At any rate they all agree, Frazzini, Mr. Basich, the plaintiff, and Mr. Kovick, that they did countermand the orders, and continued with the work. Mr. Basich testified this morning that he

entered into a contract with P.D.O.C. to produce equipment to move another shovel on there.

The Court: I was not very much impressed, when they adopted on method of carrying laborers, and their bookkeeping shows definitely a severance, how that could be called a departure from the contract, even under the strict rules of court, because ultimately you are interested just as much as they are that the laborers be paid. If they agreed to carry them on their payroll, but abide by what the other people told them as to how much work was performed, and as the evidence shows clearly, without interference, without question, I don't see how you can be hurt. Certainly, if the Circuit Court through that were sufficient, they would have held they were not the subcontractors.

In the opinion they rendered the Circuit Court said that Basich Brothers paid all the payrolls of Duque & Frazzini; then they brushed aside any question about it by saying that did not prevent them from being subcontractors, it being contended that, in view of the fact that the laborers were paid by them they were only material men. The court said no.

I am not very much impressed by that thought, and I don't think in any of the cases you cite there is a case where the mere fact that a man is carried on the payroll changes the relationship. It happened that it was to the advantage of everybody. It was being done.

Furthermore, the very minute your man went down there he saw the books; and I don't care

whether he says he did not see them, or not. They were there. Everybody examined the books; we know they were there, because he is charged with knowledge. From the very beginning these men were carried, and he never having brought it to your knowledge, that is your loss, assuming it would have made a change.

Mr. McCall: That is one thing that changed the circumstances.

The Court: That is a very important thing. As I go back and note that, I was impressed. Recently, in an opinion I wrote under the Miller Act, I am not sure just how the question arose: Whether the subcontractor was entitled to notice, but the contractor had been given notice so as to allow him to come in under the Miller Act. The bonding company maintained that the company had no notice, and there was no liability. I found, however, that as a precaution they did exactly what was done here, except that they sent one bill made out to both parties—to the prime contractor and to the subcontractor, but that the subcontractor O.K.'d the bill and sent a copy to the prime contractor, who paid it. This also was government work, at the aviation field at Murock Lake.

On the basis of that I said the contractor and surety were not in a position to come into court and say: We did not have the formal notice. I held the circumstances in the case were sufficient to dispense with any formal notice under the Miller Act, so I gave them the benefit of it.

That is the way all these acts are interpreted, whether you follow the strict rule or the liberal rule. They hold, as I tried to demonstrate the last time, and in that respect said, that even the cases holding to the strictissimi juris idea say that there must be a substantial change, a change which, from its nature, is likely to harm the other side.

How could they be harmed? Because Basich Brothers paid each month on demand. Suppose they had sent a check to them. Suppose they advanced them money. You could not have been harmed by that. As it is, they may show the work actually incurred and paid by individual checks upon the demand of these people. There is nothing in the contract which says they can't advance money, so long as they do not exceed the maximum of the term payments as they become due under the contract.

Mr. McCall: But in the case your Honor just referred to, I notice that is a case in Arizona. They were in the District Court of Arizona.

The Court: It doesn't decide this point, but it is interesting to note that here is a court which considers it absolutely unimportant. Why should I consider it important in determining a different kind of breach which is alleged.

Mr. McCall: In that case the defendant Basich Brothers had taken the position in their pleadings and all of their records that there was no subcontract. They took the position that Duque & Frazzini were not subcontractors, but they were

merely furnishers of material. That is what the court held before.

The Court: But the decision showed that under the law their contention was incorrect. The court had the same facts there as to the relationship—mixed law and facts. The mere facts that they assumed an opposite position in one case does not mean anything. No litigant is required to assume a consistent position. They can assume any position towards you, and if it benefits the plaintiff they can assume an inconsistent position with someone else. All the consistency that is required is a consistency in their position which is arising out of your particular contract. You have the same right in your defense. You don't have to be consistent in your defense.

Mr. McCall: That, of course, comes up from Arizona, where they do not have the rule of strictissimi juris. Also, your Honor, as I have just mentioned, that was a case where laborers and material men had sued the general contractor and his surety under the Miller Act.

The Court: They defended it on the ground that they were not material men, because under this arrangement the court said: No, you were subcontractors under the law. And allowed them the benefit of the Act against Basich Brothers.

Mr. McCall: That's right.

The Court: I don't say they decided the point. I merely say it is very significant that the court did not find the mere fact that the very labor you sued was sued under the arrangement which allowed

Basich Brothers to carry the payroll in their own name, and pay all the persons who worked for Duque & Frazzini. Don't you consider that as significant enough to alter the relationship of contractor and subcontractor. That is all the analogy I draw from the case.

Mr. McCall: I happened to be in that case over there, on a third party complaint.

The next question, your Honor, is the question of premature payments. Of course, payments were made from the very beginning, and there was never any amount, according to plaintiff's own testimony, due Duque & Frazzini, the subcontractor. On the further question of control——

The Court: That impressed me before, but that point does not impress me very much now, for the same reason that I gave before, and that is there is nothing to prevent them from advancing money so long as, at the time the first payment is due, they have not exceeded in advancing the amount that would have become due.

A surety is not injured if, for instance—let us take an ordinary house. Most of us who have practiced law are familiar with that, although, as a Judge of the Superior Court, and as Judge of this court, I have handled all sorts of cases relating to construction which required me to even pass on the value of material, and so forth. Supposing you have the usual provision for the payment of say 15 per cent of the contract price when the rough plumbing is completed, and suppose just before the rough plumbing is completed some laborers are

unpaid, and the contractor says: All right, I will pay the laborers, and deduct it from the amount; unless at that time he advanced more than would be due, when the rough plumbing was completed, you can't possibly be hurt. It would not be a substantial variation of your contract. That is why I said a full detail of the transaction, the method of payment, would clarify all these questions which, upon the cold record, seemed so vital one way or the other.

Suppose it is admitted that it does appear in the record that they advanced several thousand dollars the first week, that doesn't harm you in any way, and would not be a substantial breach of your contract.

Mr. McCall: At the time the first payment became due they had advanced more money than the first payment. That is shown by Paragraph XVI of the plaintiff's complaint, in which it is alleged he has paid out so many thousands of dollars more than they have earned.

The Court: Over the entire period.

Mr. McCall: Up until that time, yes, and there was nothing due until after the 31st of March. But in this case, what I was mentioning about control, I did not have in mind the payments. I was going to mention Mr. Kovick, in his deposition, where he was asked what he was doing in this pit along the first 10 or 12 days in February. He said he was there superintending the necessary production of material, or words to that effect. Then he comes

along later, and he said other acts, which shows he was in complete charge.

The Court: I don't think there was any control at all. I think that testimony must be taken in conjunction with Frazzini's, which shows he ran the job, and also the testimony of Mr. Basich. It is absolutely undisputed that no one was interfered with.

I will decide right now that the evidence in the record shows that Basich Brothers at no time had control over the work, and the manner of its doing. The only relationship they had with the workmen was they paid them their wages upon the payrolls presented to them and signed by Duque & Frazzini, or their agents.

Mr. McCall: Can I mention then the next question I have in mind from my notes?

The Court: Go ahead. I am not interrupting. I may change my mind in the next five minutes. I am telling you as to these particular things, and the evidence which has been introduced now is quite revealing to dispel any substance to any claim.

I will say, if Mr. Justice (?) got hold of this case on that point, he certainly would clarify the rule, and hold that that does not mean any deviation; that it means a substantial deviation, which is the law of Arizona, and the law of any other country. It is not the law of California, as I read it, that any deviation, regardless of whether it results in harm to you, is a deviation of the contract.

The evidence would have to show, as I said before, that you actually started under one setup, and

then proceeded under another. The evidence does not show that. In fact, the evidence shows to the contrary, and the payment of the wages, and the payment of the insurance, carrying the liability in their name, is shown to have been really a favor to the man, because otherwise he would have been required, under the Employers' Liability Law of California, to make a deposit of \$10,000.00, which he was not in a position to do.

So we must not go to the absurd length of holding that the rule in California would warrant a nullification of the contract of indemnity upon insignificant changes. They must be of substance, because the law does not deal with insignificant things. What the law is interested in is that a party to a contract should not conduct himself in a way that by changing the very terms, jeopard the interest of the other side by insignificant changes made in good faith to carry out the contract.

Mr. McCall: I would like to call the court's attention to a case which counsel has mentioned, and we have also mentioned, *Union Indemnity Co. vs. Lang*, 71 Fed. 2d 901. In that case the court held that the notice was not sufficient, and it was not as long in being served as the notice we have here.

The Court: The one thing that impressed me in the case is that exchange of letters, which shows that somebody was either doing his best to keep him going, or it shows he did not care to assume any other obligations until he got good and ready, because in all the answers written to the various notices there is not a specific statement which stated

that they wanted to do something about it. All they said was: We will see about it. See what we can do. Even after they assumed responsibility for the work, I said in a prior statement, I think they might have waited, because at that time we were not discussing the question finally. I was just expressing certain things which were running through my mind—whether in this case the very attitude of both parties, each trying his best to adjust the matter, did not give the plaintiff in this case a sense of security, so as to justify action in the belief that everybody would cooperate when the crisis actually came.

We have an illustration in fire insurance, where a time limit is set for claims, and where the insured, who does not know the home company, but knows only his local agent, goes to him and the agent either tells him he will take care of it, or says, you don't need to do it; I will take it up. The company cannot avoid liability where it was the action of its agent which induced him into a sense of false security, and which compelled him to desist from making the claims.

I had a very interesting case in the Superior Court, where a man actually went to a local agent, made his proofs of loss, and left them there. The agent pigeon-holed them, and they never left actually, but the insurance company resisted liability on the ground that the local agent was doing a favor to the insured. That he was not under obligation to forward it. But I held that despite the fact that the insurance policy said that notice

shall not be effective until received, when he deposited it there, they are not in a position to say they shall avoid liability, when the insured said: I went to the agent, and he said, all right, I will take care of it.

I want you to point out to me where there is, in the letters exchanged with your company, a direct statement, if your man has fallen down on the job, that you are willing to give them so many days, and after a certain time you will walk right in and see that it is completed? Where is it shown that you ever made that notice, which is given you under the statute? You wrote some of the letters, but not all of them.

Mr. McCall: Yes.

The Court: It seemed to me there was so much dickering, one with the other, that Basich Brothers were confronted with an emergency, which would entail great losses of time to themselves and to your client.

Mr. McCall: To the principal.

The Court: Yes, to the company, the principal. Let us take them by name. The words "obligor," "obligee," are at times confusing, when you are talking about an individual.

In assuming control, what was there to prevent them, in view of the absence of some demand, from going on? You could always have said you were coming in. Instead of that, your company, as soon as they learned, said afterward: You have already started. You did not give us a chance. If they had stopped, and allowed damages to accumulate, the

loss would have been greater to Duque & Frazzini. So there is a duty to minimize the loss. A man cannot sit idly by, because another has failed in the obligation.

I had a case recently where I applied the same principle, where a veteran was seeking reinstatement. The government attorney claimed that he must be re-employed, whether he has worked or not, or has made any money. That he was entitled to the salary he would have earned, despite the fact that they asked him to come back. In that case I held that they could not prevail in their contention.

Mr. McCall: I understood the court to say in effect that there was no waiver on the part of the surety, because they did not go in there and insist on taking over.

The Court: I was not talking definitely. I was going by the record. I found in these depositions another situation. Here is what I said:

“The record is not very clear”—everything I said was prefaced by the proposition that it was not very clear. I made the specific point several times that I was not deciding any point except one point of law, on which I said my mind was made up. I was merely giving you reasons why the cases should be reopened.

This is what I said, on page 30:

“The record is not very clear as to what actually took place on June 8th. Duque & Frazzini have not testified. The testimony is merely that they were notified that he was quitting the job, and they went on and com-

pleted the work, but not until a few days afterwards did they notify them, and even then it was not a request to do anything, but merely a general statement, because in fact, if you were completing the contract on the basis of that, it is alleged that you chose to complete the contract without giving them the first opportunity; that you were under obligations to the government, but there was nothing in the contract you have which said that you had the right to complete it, and the doctrine of minimizing loss does not mean completing the work. There is no case that warrants that. The doctrine of minimizing loss occurs mostly in torts. When applied in a contract it means merely that a man should protect the property. I have not found any cases that you have cited that hold to the extent that minimizing damage means that you can walk right in and conclude the contract."

We have now the Frazzini deposition, and he explains what actually took place, and we have additional testimony. So that what I said before I said with a warning, which I usually give, and that was that the case was not completed, and therefore every point I was raising was a tentative point. I am not so sure on the record now, in the light of the true relationship. That is why I came to the conclusion which was that this manner of payment, this arrangement, was so fundamental that ultimately it affected the view of the court upon every one of the points, because behind it all laid this

very situation, that is, the arrangement whereby financial responsibilities were taken over by others.

Mr. McCall: Touching on the point your Honor made a few minutes ago, as to why the surety did not do something, I indicated that it was ready to take over, but from the very nature of the surety contract it has no position on the job, and could not take any action, either with the principal or the obligee. As long as the principal is on the job, and knew when the obligee under the terms of his contract has defaulted, and put the principal off the job, then he has to call on the surety, but not before that.

The Court: When they took over, they wrote the letter, and said they had abandoned the job. There was nothing to prevent you, after that, from saying: We are taking over. We will not be responsible. Then you have notice.

Mr. McCall: We did not have the notice required by the surety bond itself.

The Court: When they tell you a man has abandoned the contract, that is all the notice you would want. They don't ask you whether you will take the job. It is up to you to say, under the circumstances. Wasn't it your duty to say: Gentlemen, you have notified us. We will not be responsible. We are ready to go on. There is nothing in this letter even that you notified them you were ready to go on with the job. Week after week elapsed, and finally, after the damage had already been done, then failure to give the proper notice was raised.

Mr. McCall: Is it not a fact, your Honor, if before that time, as we claim, the obligee had failed to perform a condition precedent set out in the surety contract, then there would be no liability on the part of the surety to respond, when he said he had taken over.

The Court: Provided the surety had washed its hands of the fact. Provided the surety had sent in a man there to straighten it out. On the other hand, when the surety goes in, and tries, with the prime contractor, to straighten things out, and gives a sense of security to anybody who has worked for them he cannot be heard later on to say, Well, I did not find out a lot of other things that happened before.

Mr. McCall: In the California cases——

The Court: I know, but we have a right to interpret the facts. I am bound by the law of California, but I am not bound by any law of California as to how to interpret the facts and the inference drawn from the failure to act, and what inference is to be drawn from the testimony of the witnesses, and from letters and documents offered in evidence, and the Circuit Court of Appeals will not reverse my findings unless, under the new rules, I am clearly wrong.

So I am submitting to you why I now believe some of the deficiencies have been supplied as I did to the plaintiff the last time, because the deficiencies were in the plaintiff's proof. Other glaring deficiencies appeared in your defense, which I pointed out, and from which I will draw the proper infer-

ence at the proper time. But it does seem to me, as I look back, that this is a case where the surety company at no time took a definite stand on anything. All it did was to promise to do this and to do that. Supposing that they had left all their own equipment there, not being used, and continued to charge?

Another thing I learned today was about the relationship of the equipment. That was not clear to me before. Now it is very clear to me that this equipment was hired out to them. It was equipment which they hired from others for the benefit of Duque & Frazzini, and did not charge one dime as a profit, but were merely accommodating them. So, while in truth and in fact they were legally liable, as a matter of fact, under the law of California, they could have been held as an undisclosed principal, on a contract made for the benefit of third parties.

When this testimony was coming in I purposely did not make any comments, and I asked very few questions, and the only time I express them is while both of you are before me.

Mr. McCall: Reverting to these letters again, may it please the court, I have just read excerpts from them. They demanded right up to the last that Duque & Frazzini stay on the job, and continue their performance. The sureties certainly could not get on the job until the subcontractors had pulled off.

The Court: But the surety did nothing; they did not say to Duque & Frazzini, stay on the job, or

we will take it over. Where is there any letter to that effect?

Mr. McCall: I understand the court to say, in the comments here, in effect, that the surety had a right to stand on the terms——

The Court: I did not. I am sorry you misunderstood me. I was not discussing a question of fact, because I did not know what facts would be brought in. I said on the face of it it looked to me that way. Now I have stated how it looks to me in the light of additional testimony. I notice I addressed that as a query to Mr. Monteleone. Then afterward I turned around and I said: I don't want you to feel I was not talking to you at the same time. But the reason I was doing that was to point out certain weaknesses in the case which had to be explained before I could decide the facts in this case. I don't think it is the law, and it is naturally not the right of the surety, despite the knowledge of what was going on, and with the knowledge of the contractor, to just stand by and say, I will see that I get the right notice. And when they gave the notice it was too late.

Mr. McCall: I do not know of any place where the surety could have, under the law, gone in on that job.

The Court: If that is your answer, that is all right. The object of my inquiry is to get as much light as I can. I have not learned to be a judge, except by the Socratic method. That is why I like oral argument, because I can ask questions of the writer of the brief. No matter how elaborate the

briefs are, it is helpful in clarifying the thoughts to counsel.

Mr. McCall: I further understood on that point that the court had agreed with me that the notice, of the letter of April 5, was only a letter demanding something, and that it could not be considered a notice. If we take the letter of the plaintiff here, they have not given notice at all at any time during the proceeding, that is required by the surety company—notice of default. And counsel has said in this court, which is reflected in the transcript of the pre-trials, that there was no default until June 8th.

The Court: I always said that the main point in the case was the measure of control. On page 25 I said.

“The Court: In view of the fact that the case is going to be reopened for the purpose of showing the true relationship between the parties, and answering the proposition of what, if any, measure of control may have been exercised, it is important to note that the Supreme Court of Arizona, in applying these principles, has insisted that modifications are not the basis for exonerating the surety, if they are of such character that the court can say that the essential features and objects of the original contract were maintained. If the changes are of substance, even the liberal Arizona law would not release the surety, and this for the very obvious reason which the court gave in the case referred to, Prescott National Bank vs. Head, that even a literal interpretation will not be allowed

if the changes, in effect, make a new contract a substitute for the original contract. * * *

“In other words, even the Supreme Court of Arizona, liberal as it is, does not say that you can make a change of a substantial nature in the relationship of the parties and still hold the surety, who has no knowledge of the changes, and was not consulted before they were agreed to by the parties, because I think if that were true the Arizona decision would lead to an absurdity, and would subject the surety company to obligations upon modified conditions which its bond did not underwrite. So that even if I adopt the view that this is an Arizona contract we still have the problem of whether these changes are substantial or not, because if they were, then, of course, the same rule would apply as applied if we consider the contract, as I am inclined to at the present time, a California contract to be governed by California law.

“Mr. Monteleone: What changes does your Honor contend were made in the contract that this contract itself does not specify?

“The Court: I am not making findings as to what changes were made. I am merely saying that the defendants contend that many changes were made.”

Then I said,

“I am not deciding the case. The only conclusion I have reached is that this contract is governed by the California law and not the Arizona law. * * * I am talking about changes * * *

"In the complaint plaintiff alleges that the defendants have been in default ever since the beginning, and at all times thereafter. I will read the allegation, which is Paragraph X. * * *

"Mr. Monteleone: I don't think there was a default. I took the position that there were partial defaults.

"The Court: You cite the case of Union Sugar Company vs. Hollister Estate to this effect, but it does not alter the position. When the first breach occurs it is not the duty of the other side to treat the contract as abandoned. He may not do anything about it, and then rely upon a subsequent breach."——

That is the very point. In fact, I minimized it—"That is a general proposition of law. And in the case you cite, in 3 Cal. 2nd, 740, the court made that statement merely in order to save the claim from the statute of limitation. In other words, they said that where several breaches occur you are not bound to wait until the first breach. You can wait for the next breach and the next one, then date your claim, so far as the statute of limitations is concerned, from the last breach.

"That does not solve the problem here, because counsel say that up to April 5th, when you gave them the first written notice of any difficulties, that several breaches had already occurred, and that you had failed to give them notice."—I was talking about your contention—"Therefore, it became very important that all the evidence relating to what

actually took place, if there is any more than is contained in these affidavits of the two men, Kovick and Nick Basich, be gone into, and not leave anything for further discussion.”

Another thing is this: A man does not have to consider a breach unless it is substantial, if he is assured, as he was assured in this case, that additional equipment would be secured.

I did not say what you contend. I merely pointed out that in view of the allegations that you made, dating back to the breach—not the date they allege, because of prior breaches, the matter should be clarified. I may have used language which was broad, and I stated to counsel repeatedly that I was not deciding anything except one point; that the contract is governed by California law. That is the only thing I said. Is there anything further?

Mr. Monteleone: Nothing further.

The Court: The matter will stand submitted.

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 4th day of April, A.D. 1947.

HENRY A. DEWING,
Official Reporter.

[Endorsed]: Filed May 16, 1947.

PLAINTIFF'S EXHIBIT No. 1

Subcontract Agreement

[Plaintiff's Exhibit No. 1 is identical with Exhibit A attached to Complaint for Recovery of Money and on Bond, and is set out on pages 17 to 32.]

[Endorsed]: Filed U.S.C.C.A. June 15, 1947.

PLAINTIFF'S EXHIBIT No. 2

Subcontract Bond

[Plaintiff's Exhibit No. 2 is identical with Exhibit B attached to Complaint for Recovery of Money and on Bond, and is set out on pages 32 to 36.]

[Endorsed]: Received in evidence U.S.D.C.
Sept. 30, 1946.

PLAINTIFF'S EXHIBIT No. 3

[Letterhead Glens Falls Indemnity Company
of Glens Falls, New York]

Los Angeles 13, Calif.

March 7th, 1945

Re: Duque & Frazzini to Basich Bros.
Construction Co. Contract bond

Basich Bros. Construction Co.
600 So. Fremont Ave.
Alhambra, Calif.

Gentlemen:

It is hereby understood and agreed that the 10 days appearing in paragraph "First" is changed to read "Twenty (20) days".

[Seal] GLENS FALLS INDEMNITY
Company,

By: MARWIN F. JONAS,
Attorney.

[Pencil Notation]: Requested to issue income
for bond premiums 4/3/45—M. Klotz.

[Endorsed]: U.S.D.C. Received in evidence
Sept. 30, 1946.

PLAINTIFF'S EXHIBIT No. 4

(Copy)

[Letterhead Basich Brothers Construction Co.]

Registered Mail

April 5, 1945

Duque and Frazzini,
P. O. Box 73,
Tonopah, Nevada

Gentlemen :

Reference is made to our Contract Agreement, dated February 7, 1945, in which you agreed to commence crushing material with one plant on February 19, 1945. It was further agreed that you were to move in two plants, each capable of producing 800 cubic yards per day of suitable material.

Your attention is directed to the fact that the plant did not commence work on February 19th; furthermore, to date you have not averaged 800 cubic yards of material per plant per day.

Since we reserve the right to compel you to move in additional equipment to insure proper completion of your contract, we hereby demand that you move in additional and suitable equipment in order to produce the amount agreed upon in our contract.

Our entire concrete paving operation is dependent on your production and you are reminded that your Company is now using our tools and equipment,

since you do not have suitable equipment of your own on the job.

Very truly your,

BASICH BROTHERS CON-
STRUCTION CO.,

By N. L. BASICH.

cc: Duque & Frazzini, Tucson, Ariz.

cc: Glens Falls Indemnity Co.,

Los Angeles, California.

GJP/de

[Endorsed]: U.S.D.C. Received in evidence
Sept. 30, 1946.

PLAINTIFF'S EXHIBIT No. 5

[Letterhead Stephen Monteleone]

April 27, 1945

To Duque & Frazzini

P. O. Box 73

Tonopah, Nevada,

and

Glens Falls Indemnity Company

of Glens Falls, New York;

801 Fidelity Building,

548 South Spring Street

Los Angeles 13, California

You and each of you are hereby notified that:

Whereas, on February 7, 1945, Basich Brothers Construction Company, as first party, entered into a written contract with said Duque & Frazzini as second parties by the terms of which said contract said second parties, as subcontractors, agreed to

perform certain of the requirements therein specifically stated in connection with the contract between first party as the Prime Contractor and the United States of America for the construction of Taxiways, warm-up and parking aprons, Job. No. Davis-Monthan ESA 210-6, 210-8, and 210-9, Davis-Monthan Field, Tucson, Arizona, Contract No. W-04-353-Eng.-1302;

Whereas, in said contract between said first party and said second parties of date February 7, 1945, it is provided, among other things, that if said second parties, as such sub-contractors, shall fail to prosecute said work continuously with sufficient workmen and equipment to insure its completion, first party, within five days will reserve the right to compel said subcontractors to move in another plant;

Whereas, said second parties, as such subcontractors, agreed to erect two plants, each to produce 800 cubic yards of suitable material a day to be used in connection with said Government Contract;

Whereas, said second parties agreed, in said contract of date February 7, 1945, to commence their work not later than February 19, 1945, and shall complete the same on or before June 3, 1945;

Whereas, it is therein further provided that time is of the essence of said contract;

Whereas, said second parties have failed to comply with the obligations imposed on them in said contract of date, February 7, 1945, in that, among other things, they have failed to prosecute said work continuously with sufficient workmen and equipment as therein required; and further, they have

failed to produce 800 cubic yards of suitable material a day from each of said two plants but instead have produced less than fifty per cent thereof;

Whereas, on April 5, 1945, said Basich Brothers Construction Company notified said Duque & Frazzini and its surety, said Glens Falls Indemnity Company of the aforesaid failure to comply with said contract of date February 7, 1945, and demanded that additional and suitable equipment be moved on the job to produce the amount of material as in said agreement provided, all of which both said second parties and their said surety company failed to do;

Now, therefore, you, the said Duque & Frazzini, as principals, and said Glens Falls Indemnity Company as the surety of said principals, are, and each of you are, hereby notified that said Basich Brothers Construction Company will hold you and each of you responsible for all direct and consequential damages sustained by them by reason of said failure to comply with said contract and any future damages, both direct and consequential, which may result by your continued failure to comply with the above requirements of said contract;

You, and each of you are hereby notified that said Basich Brothers Construction Company will exercise all reasonable efforts to minimize said damages and will endeavor to, and if possible, will install additional and independent means of produce the required material without in any manner waiving its claims or any rights against you and each

of you or in any manner releasing you or any of your obligations, past, present and future, under said contract of date February 7, 1945.

Dated: April 27, 1945.

BASICH BROTHERS CON-
STRUCTION COMPANY,
/s/ By STEPHEN MONTELEONE,
Its Attorney.

SM/gr

[Endorsed]: U.S.D.C. Received in evidence
Sept. 30, 1946.

PLAINTIFF'S EXHIBIT No. 6

[Letterhead John E. McCall]

May 8, 1945

Mr. Stephen Monteleone
Attorney at Law
Petroleum Building
714 West Olympic Boulevard
Los Angeles 15, California
Re: Subcontract between Basich
Brothers Construction Co.
and Duque & Frazzini
Our File No. 2025

Dear Mr. Monteleone:

Your letters of April 27th, 1945 addressed to Duque & Frazzini and Glens Falls Indemnity Company has been referred to me by my client Glens Falls Indemnity Company for attention and reply as to the Surety. This will also confirm the con-

versation of May 3rd, 1945 between you, Mr. N. L. Basich, Mr. John Bray and myself.

In our conversation last Thursday I understood that your client has suffered no damage by reason of any delay on the part of the subcontractor to date, but is fearful that the equipment which the subcontractor is using at this time will fail to furnish or turn out enough base material to finish the job on schedule.

As I understand it, there are two plants on the job operated by the subcontractor. One plant was rented to the subcontractor by your client, and Mr. Basich stated that there is no complaint about the quantity of aggregates turned out by this plant. I understand there is another plant in the same vicinity which is owned by the subcontractor, smaller in size than the plant belonging to your client. Your client states that this latter plant does not have the capacity to turn out a sufficient amount of material which, added to the material turned out by the other plant, will finish the job on time.

I was advised by Mr. Bray this morning that he called Duque & Frazzini and was told that they are now turning out the required quantity of material, and if necessary they will operate another shift.

I am sending a copy of this letter to Messrs. Duque & Frazzini at Tucson, Arizona, and I feel sure they will co-operate with your client to the fullest extent.

It is always a pleasure to work with you. If any friction arises between the contractors regarding the work in question, I shall be glad to work with you

in an effort to secure complete co-operation between them.

Yours very truly,

J. E. McCALL.

JEMcC:mc

[Endorsed]: U.S.D.C. Received in evidence
Sept. 30, 1946.

PLAINTIFF'S EXHIBIT No. 7

[Letterhead Stephen Monteleone]

May 15, 1945

Mr. John E. McCall
Attorney at Law
458 South Spring Street
Los Angeles 13, California

Re: Sub-contract between Basich
Brothers Construction Company and
Duque & Frazzini.

Dear Mr. McCall:

I beg to acknowledge receipt of yours of the 8th inst., in reference to the above matter. Apparently your Mr. Bray must have accomplished good results for the reason that I have heard nothing further from my client Basich Brothers Construction Company in connection with the above matter.

I note in your said communication that you stated that Mr. Basich in his conversation at your office claimed that he suffered no damage by reason of any delay on the part of the subcontractor to

date. This apparently is a misunderstanding on your part. Mr. Basich did state that he does not intend to make any claim for any damages in the past provided Duque & Frazzini would cause no delay in the operation in the future. He indicated that he was only concerned in finishing the job and not in making any claim for damages against your company or the sub-contractor, provided there was no future delay which would entail the suspension of his operation with the loss of a payroll amounting to \$3,000.00 a day.

I felt that with the cooperation existing between us all, there will be no further revival of this matter and I want to take this occasion to thank you and your company for all they have done to eliminate any danger in connection with the suspension of my client's operation.

Your truly,

/s/ STEPHEN MONTELEONE,

SM/gr

[Endorsed]: U.S.D.C. Received in evidence
Sept. 30, 1946.

PLAINTIFF'S EXHIBIT No. 8

[Letterhead Stephen Monteleone]

May 23, 1945

To Duque & Frazzini,
P. O. Box 73,
Tonopah, Nevada,
and

Glens Falls Indemnity Company of Glens Falls,
New York,
801 Fidelity Building,
548 South Spring Street,
Los Angeles 13, California.

Gentlemen:

You and each of you are hereby notified:

That on February 7, 1945, Basich Brothers Construction Company, prime contractor as first party, entered into a written contract with Duque & Frazzini as sub-contractor, second parties, in connection with the construction of taxiways, warm-up and parking aprons, Job No. Davis-Monthan ESA 210-6, 210-8 and 210-9, Davis-Monthan Field, Tuscon, Arizona, Contract No. W-04-353-Eng. 1302;

Whereas, pursuant to said contract, Glens Falls Indemnity Company of Glens Falls, New York, executed, as surety, and said Duque & Frazzini as principals, a sub-contract bond in favor of Basich Brothers Construction Company in the sum of \$101,745.55, dated Febraury 20, 1945;

Whereas, each of you were notified on April 5, 1945, that said Duque & Frazzini, as sub-contractor,

failed to commence work within the time specified in said contract of date February 7, 1945, or to prosecute said work continuously with sufficient workmen and equipment to insure its completion as in said contract provided and, pursuant to the rights therein reserved in favor of said prime contractor, it notified you of said failure on the part of said sub-contractor and required that additional and suitable equipment be moved on the job in order to produce the amount of material required under said contract;

Whereas, you, Duque & Frazzini as principal, and you, Glens Falls Indemnity Company, as surety, failed to correct said breach or to comply with the above requirement;

Whereas, on April 27, 1945, Basich Brothers Construction Company again notified you in writing of said failure on the part of said Duque & Frazzini to comply with said contract of date February 7, 1945, and, although you and each of you have promised to correct said default on the part of said sub-contractors, this you and each of you have failed to do;

Now, therefore, you, Duque & Frazzini, as Principal on said bond, and you, Glens Falls Indemnity Company, a surety thereon, are again notified that said Duque & Frazzini have failed to correct their said default in that they are not prosecuting said work with sufficient workmen and equipment to insure its completion within the specified time; furthermore, that instead of each of the plants re-

ferred to in said contract of date February 7, 1945, producing 800 cubic yards of suitable material as therein required, each of said plans is producing an average of approximately 300 cubic yards a day;

You and each of you are further notified that these facts were not only called to your attention by the above previous written notices but were personally called to the attention of your representatives in person and over the telephone on numerous occasions.

You and each of you are hereby notified that said prime contractor will hold you and each of you strictly accountable under said contract of date February 7, 1945, and said bond of date February 20, 1945, both for all past damages sustained and for all future damages which may hereafter be sustained by the continued default on the part of said sub-contractor to comply with said contract of date February 7, 1945; however, you and each of you are again hereby notified to correct said default.

Yours truly,

BASICH BROTHERS CON-
STRUCTION COMPANY,

/s/ By STEPHEN MONTELEONE.

Its Attorney.

[Endosed]: U.S.D.C. Received in evidence
Sept. 30, 1946.

PLAINTIFF'S EXHIBIT No. 9

[Letterhead Stephen Monteleone]

May 24, 1945

To Duque & Frazzini

P. O. Box 73

Tonopah, Nevada,

and

Glens Falls Indemnity Company of

Glens Falls, New York,

801 Fidelity Building

548 South Spring Street

Los Angeles 13, California.

Gentlemen:

You and each of you are hereby notified:

That on February 7, 1945, Basich Brothers Construction Company, prime contractor as first party, entered into a written contract with Duque & Frazzini as sub-contractor, second parties, in connection with the construction of taxiways, warm-up and parking aprons, Job No. Davis-Monthan ESA 210-6, 210-8 and 210-9, Davis-Monthan Field, Tuscon, Arizona, Contract No. W-04-353-Eng. 1302;

Whereas, pursuant to said contract, Glens Falls Indemnity Company of Glens Falls, New York, executed, as surety, and said Duque & Frazzini as principals, a sub-contract bond in favor of Basich Brothers Construction Company in the sum of \$101,745.55, dated February 20, 1945;

Whereas, Article XI of said contract of date February 7, 1945 requires the sub-contractors to

promptly make payment to all persons supplying them with labor, materials and supplies for the prosecution of the work or in connection therewith and in the event the sub-contractor shall not make such payments, the prime contractor may make said payments and deduct from any moneys due the sub-contractor such advancements.

Whereas, it is provided in the bond of said sub-contractor of date February 20, 1945, that the principal and surety agree to pay all just labor claims arising under said contract within two weeks after demand.

You, and each of you, are hereby notified that said sub-contractors are not paying the just labor claims arising under said contract of date February 7, 1945 and, apparently will encounter difficulty in continuing the payment of said labor claims.

You, and each of you, are hereby notified that pursuant to said Article XI contained in said contract of February 7, 1945, the prime contractor has made labor payments, material payments and supply payments for said sub-contractors in the past for the prosecution of said work but that the amount of moneys due the sub-contractors is not sufficient to meet the past advancements made by the contractor Basich Brothers Construction Company; that such deficiency shall be chargeable against the sub-contractors and the above surety Glens Falls Indemnity Company. As soon as an account can be prepared on this matter, the same will be submitted to you.

You are hereby further notified that demand is

hereby made upon the said principal and the said surety on said bond to make all present payments due on labor claims arising under said contract and all further and future labor claims as provided in said bond and in said agreement of date February 7, 1945, and, upon failure to do so, the contractor, Basich Brothers Construction Company, will make said payment and charge the same against said surety and said principal.

As this matter is of vital importance in the prosecution of this work, will you kindly advise me of your disposition in connection with the above request and demand at your earliest convenience and also acknowledge receipt of this notification.

Yours truly,

BASICH BROTHERS CON-
STRUCTION COMPANY,

/s/ By STEPHEN MONTELEONE,

Its Attorney.

SM/gr

[Endorsed]: U.S.D.C. Received in evidence
Sept. 30, 1946.

PLAINTIFF'S EXHIBIT No. 10

(Copy)

[Letterhead Basich Brothers Construction Co.]

June 1, 1945

Duque and Frazzini,
Post Office Box 73,
Tonopah, Nevada,
and
Glens Falls Indemnity Company
of Glens Falls, New York,
801 Fidelity Building,
548 South Spring Street,
Los Angeles 13, California.

You and each of you are hereby notified that:

Whereas, on February 7, 1945, Basich Brothers Construction Company, as first party, entered into a written contract with said Duque and Frazzini as second parties by the terms of which said contract said second parties, as subcontractors, agreed to perform certain of the requirements therein specifically stated in connection with the contract between first party as the Prime Contractor and the United States of America for the construction of Taxiways, warm-up and parking aprons, Job No. Davis-Monthan ESA 210-6, 210-8, and 210-9, Davis-Monthan Field, Tucson, Arizona, Contract No. W-04-353-Eng.-1302;

Whereas, your attorney, Mr. John McCall, was this date advised via telephone that we have just

received information that your insured, Duque and Frazzini, shut down their small crushing plant on May 31, 1945, and contemplate closing the Pioneer plant June 2, and June 3, 1945.

This letter is to confirm the above mentioned telephone conversation and to inform you of the current situation. As you have been frequently instructed, any suspension for an appreciable time of operation of the plants concerned will result in a terrific loss to us, as we are dependent upon materials required to be furnished by your insured, in order that we may carry on our operations.

We wish to further advise you that we will take such action, as we are able under the circumstances, to meet the requirements on our part to perform this vital defense project for the U. S. Government and, at the same time, to attempt to minimize our loss and our claim which we will be compelled to make against you under your contract and bond.

As you have been previously advised, our efforts to minimize this loss will encounter a great many obstacles and difficulties. We have received no co-operation whatever from you to minimize such loss; nevertheless, we will make all reasonable efforts in this connection, either in attempting to procure sufficient equipment to produce the deficiency in materials required of the subcontractor, or in attempting to procure the deficiency of materials through other sources, and we will make all charges and other reasonable expenses incurred in this con-

nection against you as the principal and surety on the bond furnished to us.

Very truly yours,

BASICH BROTHERS CON-
STRUCTION CO.,

/s/ By GEORGE J. POPOVICH,
Secretary.

cc: Duque & Frazzini,
Tucson, Arizona.

John McCall,
Los Angeles, Calif.

Stephen Monteleone,
Los Angeles, Calif.

GJP/dc

[Endorsed]: U.S.D.C. Received in evidence
Sept. 30, 1946.

PLAINTIFF'S EXHIBIT No. 11

[Letterhead John E. McCall]

June 7, 1945

Basich Brothers Construction Company
c/o Stephen Monteleone, Attorney
714 West Olympic Boulevard
Los Angeles 15, California

Gentlemen:

This will acknowledge receipt of copy of letters which you addressed to Duque & Frazzini, at Tonopah, Nevada, May 23rd, 24th and June 1st, 1945,

with reference to a subcontract which they have with you.

The third paragraph of your letter of May 23rd, 1945 states that said subcontractors did not commence work within the time specified in said contract, but you did not state when the subcontractors did commence work on said contract. We would like to have this information, together with any and all other information you may be able to give us concerning matters which in your opinion amount to a default on the part of said subcontractors. The subcontractors deny that they are in default in any way whatever.

Your letters of May 24th, 1945 refers to Article XI of the contract, which provides that the subcontractors will pay for all labor and material, but you overlooked Subsection 2 of Article XXI of the contract which expressly provides that your client will pay, among other things, the weekly payrolls for labor. You further state, on the second page of your said letter of May 24th, that you will pay labor claims and charge same to the Surety and subcontractors. You of course realize that your client has no right to charge anything to the Surety, as the Surety has no liability whatever except such liability as may exist under the express terms of its bond.

Your letter of June 1st stated that you had been informed that Duque & Frazzini shut down their small crusher plant on May 31st. I communicated this information to my client, and I am advised by Mr. Bray that he has received information from

the subcontractors that there was a short breakdown of the small plant, but satisfactory production has been restored.

After receipt of your two letters of May 23rd and 24th, we write, with Mr. John Bray, made a trip to the job at Tucson, at which time you were present, and we were advised by the subcontractors and by your client at the site of the plants crushing the rock and making the aggregates, that no time has been lost by your client because of under production, but on the contrary, there was enough material then ahead for several days concrete pouring. I am therefore unable to understand why your client wishes to put in additional equipment to take care of extra work when our information received from the subcontractors and from your client is to the effect that there has been no shortage whatever of aggregates to date. If this is not correct, please advise in what particular it is not correct so that I may communicate the information to my client.

Yours very truly,

/s/ JOHN E. McCALL.

JEMcC:mc

[Envelope]: From John E. McCall, Attorney at Law, 458 South Spring Street, Los Angeles 13, to Basich Brothers Construction Company, c/o Stephen Monteleone, Attorney, 714 West Olympic Boulevard, Los Angeles 15, California.

[Stamped Los Angeles, Calif. Jun 8, 4:30 P.M., 1945.]

[Endorsed]: U.S.D.C. Received in evidence Sept. 30, 1946.

PLAINTIFF'S EXHIBIT No. 12

June 8, 1945

To Duque & Frazzini,

P. O. Box 5416,

Tucson, Arizona,

and

Glens Falls Indemnity Company

of Glens Falls, New York,

801 Fidelity Building

548 South Spring Street

Los Angeles 13, California

You, and each of you, are hereby notified that:

On February 7, 1945, Basich Brothers Construction Company, prime contractor as first party, entered into a written contract with Duque & Frazzini as sub-contractor, second parties, in connection with the construction of taxiways, warm-up and parking aprons, Job No. Davis-Monthan ESA 210-6, 210-8 and 210-9, Davis-Monthan Field, Tucson, Arizona, Contract No. W-04-333-Eng. 1302;

Whereas, pursuant to said contract, Glens Falls Indemnity Company of Glens Falls, New York, executed, as surety, and said Duque & Frazzini as principals, a sub-contract bond in favor of Basich Brothers Construction Company in the sum of \$101,745.55, dated February 20, 1945;

Whereas, on April 5, 1945, we notified you, pursuant to our right under the contract of date February 7, 1945, to move in additional and suitable

equipment to produce the amount of material agreed to in said contract because of your failure at the time of said notice to prosecute said work with sufficient men and equipment as therein required. We then, in said notice, called to your attention, that the entire concrete operation of said prime contractor was dependent upon the production of said sub-contractor. Although you made an investigation of the situation and the said Surety Company sent its representative to Tucson, Arizona, to acquire first hand information and was offered the co-operation and valuable advice of the prime contractor, you failed to remedy the situation at said time.

Whereas, on April 27, 1945, we again notified you of the failure of the sub-contractor to provide sufficient men and equipment to prosecute said work and demanded that additional and suitable equipment be moved on the job to furnish the material as required in said contract of date February 7, 1945. We notified you, at said time that we would hold you and each of you responsible for all direct and consequential damage resulting therefrom. Although you conferred with us on the situation and again sent a representative to Tucson, Arizona, to investigate the situation and, although the prime contractor offered to co-operate with you in every way possible to correct the situation, you did nothing concrete to comply with the requirements of the contract. We also notified you at said time that in an effort to minimize the damages we would en-

deavor to install additional and independent means, if possible, to produce the required material without in any manner waiving our claims or any rights against you and each of you of any of your obligations, past, present and future.

On May 7, 1945, a conference was had with the representative of the surety company and its attorney, at which time the prime contractor again sought action by you and offered to co-operate to alleviate a serious situation confronting the prime contractor and the completion of an essential defense project.

Whereas, on May 24, 1945, we notified you that the prime contractor had made labor, material and supply payments for the sub-contractor but that the amount earned by the sub-contractor was less than the payments made on account of the above, demanded that you make such payments direct pursuant to your legal obligation.

Whereas, on June 1, 1945, we again notified you of the failure on your part to comply with the above requests and demands, although we spent three days in Tucson with you to meet the serious situation, and, on said date of June 1, 1945, again notified you that we would take such action as we would be able under the circumstances to meet the requirements to perform this vital defense project and minimize the damages, either by procuring sufficient equipment to produce the deficiency or procure the deficient material from other sources and charge all expenses therein incurred against you as principal and surety, respectively.

You are hereby notified that, failing to receive any co-operation from you, or either of you, except promises and assurances, we have been compelled to install a pioneer crushing plant for producing gravel base and operations thereon have commenced on or about June 7, 1945. This action on our part is for your benefit and in order to minimize the damages pursuant to previous notices given you, as aforesaid, and all charges for moving in and out, assembling and disassembling and operating said plant, including labor, materials, oil and other reasonable requirements will be charged against you.

You are failing to comply with your obligations in providing sufficient concrete aggregate and your sand-screening plant is not efficiently operating according to the requirement of said contract. This situation can be improved by operating longer hours and in a more efficient manner. Unless this situation is corrected within three days, we contemplate using all reasonable means and sufficient equipment to meet this requirement in order to minimize the damages and charge all expenses incurred in this regard, including operating expenses against you.

You and each of you are hereby further notified that on this date, June 8, 1945, Duque & Frazzini refused to load trucks of Basich Brothers with gravel base material from their plant. Demand is hereby made on you to continue your operations under said contract pursuant to the requirements

therein contained. All action taken by us is for your benefit in minimizing your damages which we are sustaining, as aforesaid, and, at the same time to permit us to complete an essential defense project for the United States Government. That the Government is vitally interested in this respect is evidenced by a letter which we received from the War Department dated June 7, 1945, a copy of which is herewith enclosed.

Demand is hereby further made on you to pay direct all labor and other expenses of said sub-contractor in the future and to pay to the prime contractor all payments made by them for the sub-contractor representing the difference between the amount of money earned by and unpaid to the sub-contractor and the payments made by the prime contractor for said sub-contractor.

Kindly give this matter your prompt attention and advise.

Yours truly,

BASICH BROTHERS
CONSTRUCTION
COMPANY,

By /s/ STEPHEN MONTELEONE,
Its Attorney.

[Letterhead War Department, U. S. Engineer Office
Southern Arizona Section, 401 West Adams,
Phoenix, Arizona]

[Copy]

P. O. Box 1711,
Tucson, Arizona

June 7, 1945.

Subject: Materials Production — Contract W-04-
353-Eng.-1302, Job No. Davis-Monthan
ESA 210-6, 8 and 9, Taxiways, Warm-up
and Parking Aprons, Davis-Monthan
Field, Tucson, Arizona.

To: Basich Brothers Construction Company.
P. O. Box 5416,
Tucson, Arizona.

Att: Mr. G. W. Kovick, Supt.

Gentlemen:

This office desires to call attention to the manner in which material is being produced by your subcontractor, Duque & Frazzini, for use on subject job and the delay which has been caused in the progress of the job due to unsatisfactory handling of material production.

This office has observed closely the production of gravel base course, mineral aggregate, and concrete material since these operations were begun. At the present time the heart of the material pit has been worked out and it now takes more effort and more time to procure good material of which there is

still an abundance at this particular location. As stated by this office in a letter of February 19, 1945, this office is of the opinion a shovel should have been used in this pit. Due to the mixing of the materials which would be accomplished by the use of a shovel, a far better grade of material would be obtained in your base course. Your subcontractors, however, elected to use carryalls. This has resulted in production of gravel base course which has alternated from fine to coarse, causing a certain amount of delay in mixing and handling of the material on the grade. The following figures are cited to direct attention to the uneven production of base course material:

May 27th.....	475 cu. yds.
May 28th.....	605 cu. yds.
May 29th.....	980 cu. yds.
May 30th.....	610 cu. yds.
May 31st.....	750 cu. yds.
June 1st.....	0 cu. yds.
June 2nd.....	no record
June 3rd.....	0 cu. yds.
June 4th.....	0 cu. yds.
June 5th.....	400 cu. yds.

At the present time there is practically no material on hand to lay the remaining plant mix on the job.

In regard to your concrete work the following figures are cited:

1. May 31st—Mixer shut down 30 minutes due to badly graded material. This necessitated

changing of the mix from a 3-inch maximum to a 1½-inch maximum to finish the concrete pour on this day.

2. June 1st—Badly graded aggregate again encountered.

3. June 2nd—Shut down at 11:00 a.m. due to no aggregate in stock pile.

4. June 4th—Changed back to 3-inch maximum mix.

5. June 6th—Stopped pour at 2:30 p.m. due to no aggregate in stock pile.

Your sand screening plant ran steadily from May 1-15 and then shut down until June 1st; on June 1st it was started again and ran until 12:00 noon on June 2nd when it again broke down; started again June 6th at noon, and at the present time is being fed very slowly. Your stock pile consists of approximately 200 yards of sand.

Your Pioneer plant made gravel base course from May 11-15 and was down on the 16th and 17th, on the 18th it started making material for paving, and on the 19th ran from 7:30 a.m. to 9:30 a.m. and shut down. Your subcontractor claimed that they were out of material in the pit. The plant was down on the 20th, ran on the 21st, 22nd and 23rd, was down one-half day on the 24th, ran 2½ hours on the 25th, ran ½ day on the 26th, all day on the 27th, the plant was down, ran all day the 28th, ran ½ day the 29th, ½ the 30th, ran all day the 31st, on June 1st ran until 2:00 p.m. when burned out motor caused shut down, on June 2nd ran all day, June

3rd ran 8 hours, ran all day on 4th and 5th, 8 hours on June 6th, and at the present writing the plant is shut down. Your stock pile of #3 rock consists of approximately 30 yards at the present time.

This office has checked your stock pile regularly and it has been noticed that your subcontractor has confined his efforts to the production of one size aggregate at a time. This has resulted in at least one stock pile being always low, usually consisting of not more than 20 yards of material. This office is of the opinion that there should be stock piles of all aggregate sufficient to prevent shut down of paving operations should there be a breakdown of the Pioneer plant.

At the pit of the Pioneer plant, where your shovel is now operating, there is a three to four foot over burden of soil. This over burden was not removed and consequently the shovel loads this native soil along with the rock and is hauled to the crushing plant. Approximately at least 50% of such material is rejected and the rejects, incurred, are loaded into trucks and hauled back and put into the bottom of the pit. This causes the Pioneer plant to wait until sufficient rock is deposited in the feeder bins, resulting in a definite loss of motion and consequent slowing of progress of the job as a whole.

This office has contacted your Mr. Kovick time after time and suggested that the pit operations go on two shifts in order to produce sufficient aggregate to prevent shut downs in the field when breakdowns occur in the crushing plant.

This office is being severely criticized due to the very inefficient operation of your material production and the resultant slow progress of the job. The Base is badly in need of the facilities being constructed under the subject contract and, while this office is aware of the fact that you have obtained a new Pioneer crusher and set it up, it is still the opinion of this office that the present set-up is very poorly managed and that further immediate steps should be taken to correct the conditions herein stated.

Very truly yours,

/s/ B. C. WOLLUMS,

Resident Engineer.

cc: The District Engineer

[Endorsed]: U.S.D.C. Received in evidence
Sept. 30, 1946.

PLAINTIFF'S EXHIBIT No. 13

June 9, 1945

To Duque & Frazzini,
P. O. Box 5416,
Tuscon, Arizona,
Tonopah, Nevada.

Gentlemen:

We beg to acknowledge receipt of yours of the 8th instant in which you notified us that you were suspending operations under your contract with us of date February 7, 1945, in connection with the

furnishing of materials used on the Davis-Monthan Field being constructed by the War Department.

You claim therein that you had been proceeding with the performance of your contract until the last day or two when you experienced some delay on account of breakdown and attempted therein to justify suspension of your work because we started to produce material.

You have repeatedly failed to comply with your part of the contract in the past as both you and your surety, Glens Falls Indemnity Company had been notified, some of which specific acts or omissions on your part were set forth in a letter of date June 7, 1945, from the resident engineers for the War Department, a copy of which said letter was, on June 8, 1945, forwarded to you and your said surety, and which failures also appear in the records of the job available to you at all times. Again, on June 8, 1945, you refused to load trucks with base material required by your contract.

We have, on numerous occasions, notified you and your said surety, that if you failed to meet your obligations we contemplated producing additional material in order to minimize your damage and at the same time to enable us to complete for the Government an essential defense project. It was only after your failure to comply with these demands that we commenced producing material in compliance with the previous notices given you and for the purposes therein stated. In doing so, we have in no manner violated our contract.

Demand is hereby made upon you to proceed to carry on your operations and prosecute your work diligently with sufficient men and equipment, commencing on or before June 15, 1945. If, however, you persist in suspending your operations, we will deem your failure to resume operations on or before said date of June 15, 1945, as an act of default, and thereafter we will carry on the work for the benefit of your Surety Company unless it desires to make other arrangements to carry on your obligations under said contract.

In the meanwhile, if you desire us to use your own equipment after June 15, 1945, kindly notify us in writing on or before June 12, 1945, in order to otherwise enable us to make other arrangements if you do not proceed thereafter.

Meanwhile, while you are suspending your operations we will use some of your equipments necessary to produce material essential to prosecute the work until June 15, 1945, in order to minimize your damages.

A copy hereof is being forwarded to Glens Falls Indemnity Company, your surety.

Yours truly,

BASICH BROTHERS
CONSTRUCTION
COMPANY

By /s/ N. L. BASICH.

[Endorsed]: U.S.D.C. Received in evidence
Sept. 30, 1946.

PLAINTIFF'S EXHIBIT No. 14

[Letterhead Stephen Monteleone]

June 11, 1945

Glens Falls Indemnity Company of
Glens Falls, New York,
801 Fidelity Building
548 South Spring Street
Los Angeles 13, California

Gentlemen:

Enclosed herewith please find copy of notice which Basich Brothers Construction Company as Prime Contractor received June 8, 1945, from Duque & Frazzini, subcontractor and your insured in connection with their subcontract of date February 7, 1945, Job No. Davis-Monthan E.S.A. 210-6, 210-8 and 210-9, Davis-Monthan Field, Tucson, Arizona, which is self explanatory.

On June 9, 1945, we forwarded to you copy of notice sent to Duque & Frazzini referring to the contents of their said letter and advising them that unless they resumed operations on or before June 15, 1945, their failure to do so would be considered an act of default. This period of time was extended in order to give them an opportunity for mature reflection of their act in suspending operations which was materially impeding the prosecution of the war and which was in violation of the demand of the government engineer in charge that the prosecution of the work should not be impeded, otherwise the government would take a hand in

the situation. However, since forwarding said notification to Duque & Frazzini on June 9, 1945, we were advised on this date that Duque & Frazzini were threatening to remove their equipments from the job which information we immediately conveyed to your Attorney John McCall.

We, therefore, deem the acts and conduct of the sub-contractor a default on their part and request of you, as their surety, that you take such action as you may deem proper. Until you do so, the Prime Contractor, upon demand of the War Department, will proceed with the work for your benefit and will comply with all reasonable instructions from you.

Yours truly,

BASICH BROTHERS
CONSTRUCTION
COMPANY

By /s/ STEPHEN MONTELEONE,
Its Attorney.

SM/gr

Tucson, Arizona
June 8, 1945

Basich Bros. Construction Company
Tucson, Arizona

Gentlemen:

Under contract of February 7, 1945, entered into with you, we are to furnish all material, supplies and equipment, except as otherwise provided in said contract, and perform all the labor required

to furnish certain materials for the work you are to perform under your original contract with the War Department, United States Engineer's Office, at the Davis-Monthan Field.

We have been proceeding with the performance of our contract with you, and have been furnishing the material required until the last day or two, when we experienced some delay on account of breakdown in equipment. This delay was unavoidable, but the equipment has now been repaired and we are again in operation.

You have now moved into the gravel pit near where we are working and have started to produce and are producing the materials which we are required to produce and furnish under our contract with you.

This is in direct violation of the contract, and the purpose of this letter is to advise you that we do consider your action a breach of the contract.

We are suspending our operation until you cease producing the material which we are required to produce under the contract, and unless you do immediately cease and remove the new equipment, we will remove our equipment from the job and treat your action as a breach of and a termination of the contract.

Very truly yours,

DUQUE & FRAZZINI

By

[Endorsed]: U.S.D.C. Received in evidence
Sept. 30, 1946.

PLAINTIFF'S EXHIBIT No. 15

[Letterhead Stephen Monteleone]

June 11, 1945

Mr. John E. McCall
Attorney at Law,
458 South Spring Street
Los Angeles 13, California

Dear Sir:

Your letter of date June 7, 1945, addressed to Basich Brothers Construction Company, c/o Stephen Monteleone, has been duly received on June 9, 1945.

You therein referred to copies of letters addressed to Duque & Frazzini of date May 23, 24 and June 1, 1945, with reference to subcontract they have with Basich Brothers Construction Company. These letters, together with other letters not therein referred to, were addressed and forwarded to both Duque & Frazzini and their surety and your client, Glens Falls Indemnity Company of New York.

You therein referred to letter of May 23, 1945, and erroneously referred to said letter as stating in the third paragraph thereof, that said subcontractors did not start work within the time specified in said contract. Reference was made in said letter of May 23, 1945, to a previous letter of date April 5, 1945, in which it was stated that work had not started within the time specified in said contract. Although your client was notified of said fact on April 5, 1945, apparently it considered the

to furnish certain materials for the work you are to perform under your original contract with the War Department, United States Engineer's Office, at the Davis-Monthan Field.

We have been proceeding with the performance of our contract with you, and have been furnishing the material required until the last day or two, when we experienced some delay on account of breakdown in equipment. This delay was unavoidable, but the equipment has now been repaired and we are again in operation.

You have now moved into the gravel pit near where we are working and have started to produce and are producing the materials which we are required to produce and furnish under our contract with you.

This is in direct violation of the contract, and the purpose of this letter is to advise you that we do consider your action a breach of the contract.

We are suspending our operation until you cease producing the material which we are required to produce under the contract, and unless you do immediately cease and remove the new equipment, we will remove our equipment from the job and treat your action as a breach of and a termination of the contract.

Very truly yours,

DUQUE & FRAZZINI

By

[Endorsed]: U.S.D.C. Received in evidence
Sept. 30, 1946.

PLAINTIFF'S EXHIBIT No. 15

[Letterhead Stephen Monteleone]

June 11, 1945

Mr. John E. McCall
Attorney at Law,
458 South Spring Street
Los Angeles 13, California

Dear Sir:

Your letter of date June 7, 1945, addressed to Basich Brothers Construction Company, c/o Stephen Monteleone, has been duly received on June 9, 1945.

You therein referred to copies of letters addressed to Duque & Frazzini of date May 23, 24 and June 1, 1945, with reference to subcontract they have with Basich Brothers Construction Company. These letters, together with other letters not therein referred to, were addressed and forwarded to both Duque & Frazzini and their surety and your client, Glens Falls Indemnity Company of New York.

You therein referred to letter of May 23, 1945, and erroneously referred to said letter as stating in the third paragraph thereof, that said subcontractors did not start work within the time specified in said contract. Reference was made in said letter of May 23, 1945, to a previous letter of date April 5, 1945, in which it was stated that work had not started within the time specified in said contract. Although your client was notified of said fact on April 5, 1945, apparently it considered the

same of no consequence as your said letter of date June 7, 1945, is the first request made inquiring when the subcontractor did commence work on said contract. For the information of your self and your client we have no direct knowledge when the work commenced but that Basich Brothers had no reason to believe that Duque & Frazzini had not sufficient workmen and equipment to insure the completion of said work as the contract provides until the early part of April, 1945. At that time they promptly and in the communication of April 5, 1945, called this fact to the attention of the subcontractors and their surety which letter your client received and which is self-explanatory.

You further inquired in your said letter of date June 7, 1945, concerning matters which in our opinion amount to a default on the part of said subcontractors. You are an attorney and, from information from time to time furnished your client, can probably form your own opinion as to whether the information furnished constituted a default on the part of the subcontractors or merely acts and omissions which caused us to sustain a loss and for which we notified your client, said surety company, we would hold it accountable on its bond. In other words, you are asking whether or not the failure on the part of the subcontractors to comply with the requirements of the contract, called repeatedly to the attention and some of which specific acts you will find in the copy of the letter of the resident engineer for the War Department which I forwarded to your client on June 8, 1945, constitutes a default or merely partial breach of

contract susceptible of more or less performance. I will leave that to you, as an attorney to decide and, if we are forced to take the matter to court, for the ultimate determination by the court.

You mentioned in your said communication concerning the liability of the respective parties to pay labor bills. This is also a matter of legal interpretation.

This is to confirm my talk to you over the telephone this day that Duque & Frazzini have not only suspended operations but are threatening to remove their equipments from the job. As far as shortage of material furnished by the subcontractor is concerned, the copy of the letter from the Government resident engineer which has been forwarded to the surety is self-explanatory.

If we can be of further service, kindly let us know.

Sincerely yours,

BASICH BROTHERS
CONSTRUCTION
COMPANY,

By /s/ STEPHEN MONTELEONE,
Its Attorney.

SM/gr

[Endorsed]: U.S.D.C. Received in evidence
Sept. 30, 1946.

PLAINTIFF'S EXHIBIT No. 16

[Letterhead of Stephen Monteleone]

June 14th, 1945

Glens Falls Indemnity Company of
Glens Falls, New York,
801 Fidelity Building
548 South Spring Street
Los Angeles 13, California

Gentlemen:

Re: Sub-contract of your insured Duque & Frazzini, dated February 7, 1945, to furnish material on Job No. Davis-Monthan Field, Tucson, Arizona:

You have been recently advised in writing by us that your insured Duque & Frazzini had suspended operations and were threatening to remove their equipments from the above job. We then notified you of the sub-contractors' default and requested you to advise us as to what action you intend taking as their insurer on the bond furnished us. We later advised you by telephone that these sub-contractors have not only dismantled portions of their plant but were removing their equipments from the job. They have completed approximately sixty per cent of their contract, leaving approximately forty per cent not completed which, under their said contract, they agreed to complete on or before June 3, 1945.

We have repeatedly demanded of your insured and yourself as the insurer to take necessary steps

to prosecute this work in strict compliance with the requirements of this contract, in order not only to expedite an essential defense project but also to minimize the amount of damages the sub-contractors and you, as their insurer, were subjecting yourselves. Regardless of these demands, neither of you did anything to remedy the situation. Accordingly, after you were given ample notice, we took measures as you had been previously advised, to not only comply with the War Department's demand for the diligent prosecution of the work on this Bomber Base but also at the same time to minimize your damages which we are sustaining, have sustained and will continue to sustain by reason of the acts and omissions of your said insured as you have been, from time to time, informed.

By the provisions of your bond you have the right, within thirty days after default, to proceed or procure others to proceed with the performance of this contract. As you have not indicated to us, after you were heretofore notified of the default of your insured, that you desired personally to proceed with the performance of this contract, we assume that it was and is your intention that we proceed with the performance of this contract on your behalf. As you well know this job is an essential defense project of the Government in prosecuting the war and no suspension of this work would be tolerated by the War Department. Unless we hear from you upon receipt hereof of other plans you have to complete this contract, we will

assume it is your desire that we complete the same for you as the insurer of the sub-contractor. All of our records of costs and other matters connected therewith are at your disposal and we will furnish you with whatever information you may request.

May we hear from you at your earliest convenience.

Yours truly,

BASICH BROTHERS CON-
STRUCTION COMPANY,
By STEPHEN MONTELEONE,
Its Attorney.

SM/gr

[Endorsed]: U.S.D.C. Received in evidence
Sept. 30, 1946.

PLAINTIFF'S EXHIBIT No. 17

[Letterhead of John E. McCall]

June 23, 1945

Basich Brothers Construction Company
C/o Mr. Stephen Monteleone, Attorney
714 West Olympic Boulevard
Los Angeles 15, California

Gentlemen:

Your letter of June 8th, 1945, addressed to Duque & Frazzini and Glens Falls Indemnity Company, and your letters of June 11th and 14th, 1945, addressed to Glens Falls Indemnity Company, have

been referred to me for attention and reply on behalf of the Glens Falls Indemnity Company only.

I do not represent the subcontractors Duque & Frazzini and do not know the full extent of their obligations to you, if any, but if you will examine the terms and conditions of the surety bond which was posted in this case I am sure you will realize that the Glens Falls Indemnity Company is not liable to you for any labor or materials or equipment performed or furnished to said subcontractors or anyone else in connection with the job in question.

Your letter of June 8th states that you have received no co-operation from either the subcontractors or the surety except "promises and assurances." Please advise us what co-operation you think you should have received from the surety, but which you have not received. I am sure you have received no "promises and assurances" other than those expressed in the terms of the surety bond. Said contract bond contains every condition under which you could have a claim or demand against the surety.

You further state that you are securing certain material and performing certain work which you are charging to the principal and surety. We do not know what agreement you may have with the subcontractors, but we are sure that you have no right to perform or furnish anything, or have anything performed or furnished and charge the same to the surety, and the surety will not recognize any claim you may make which is not expressly covered by the terms of its contract bond.

Your letter of April 5th, 1945, and several other letters received since that date state that the subcontractors did not commence work on the subcontract on February 19th, 1945, as required by the terms of their contract, but your letter of June 11th, 1945, states that you do not know when the subcontractors did commence work on the subcontract in question.

If you have wrongfully taken the contract over, as is indicated by your letters, or if you have failed to give notice required by the terms of the contract bond, or if you have failed in any other respect to perform any of the conditions precedent required of you by the terms of the bond, you can have no valid claim against the surety.

Yours very truly,

JOHN E. McCALL.

JEMcC:M

[Endorsed]: U.S.D.C. Received in evidence
Sept. 30, 1946.

PLAINTIFF'S EXHIBIT No. 18

[Letterhead of Stephen Monteleone]

June 29, 1945

Mr. John E. McCall
Attorney at Law
456 South Spring Street
Los Angeles 13, California
Dear Mr. McCall:

Your communication of the 23rd inst., addressed to Basich Brothers Construction Company in refer-

ence to sub-contractor's bond issued by your client Glens Falls Indemnity Company to Duque & Frazzini was referred to me for attention.

I do not believe your said communication calls for any answer as it appears to me that it is couched with expression which you undoubtedly contemplate employing in the event of litigation. However, I may state that Basich Brothers Construction Company are looking to your client Glens Falls Indemnity Company to accept responsibility on their surety bond according to the terms and conditions thereof and the obligations imposed upon your client by law based upon all of the facts and circumstances of the case.

It is needless for me to state the contents of the bond as you are as familiar with the same as I am and it is not my purpose to enter into any legal discussion as to the meaning of its terms.

In answer to your request that you be advised in what way Basich Brothers Construction Company has not received cooperation from your client, may I state that you are as familiar with what was or has been done or is being done by your client in connection with rendering this cooperation as my client or myself. It is apparent from the tone of your letter that your client is attempting to evade its legal obligations and that we cannot expect any cooperation from it in completing the work which its insured had contracted to do but have since abandoned. As it has been repeatedly called to your attention and the attention of your client, the construction of this bomber base is a matter of

vital importance to the defense of our country and there can be no hampering or suspension in the completion of this work. You and your client may rest assured that Basich Brothers Construction Company are willing to cooperate 100% to expedite the completion of the work which your insured had undertaken but had abandoned at the least reasonable expense and will keep you advised in all respects in connection with any matter. Whatever data you or your client may request, including items of expenditures will be furnished you upon request and the records of my client are open for your inspection at any time. My client is merely striving to minimize the loss or damage to your client and its insured and, at the same time, complete this vital defense project as required by the Federal Government.

I note in your said communication that you stated that the letter of April 5, 1945, and several other letters received indicated that the sub-contractor did not commence work on or about February 13, 1945, as required by the terms of their said contract. An examination of these various communications will show that you are in error in making such a statement.

You are also incorrect in assuming that Basich Brothers Construction Company had unlawfully taken over the contract of the sub-contractor. You and your client have been fully advised from time to time of all matters in reference to the performance or lack of performance by these sub-contractors of the requirements of their contract not only by correspondence but verbally and also by your client's

own personal examination and investigation at the premises during the progress of this work.

Yours truly,

STEPHEN MONTELEONE.

SM/gr

[Endorsed]: U.S.D.C. Received in evidence
Sept. 30, 1946.

PLAINTIFF'S EXHIBIT No. 19

Important—Payment of premium on or before stipulated date is a condition which must be complied with to validate this policy.

Workmen's Compensation Policy

No. 10495

Issued by The Industrial Commission of the State of Arizona to Basich Brothers Construction Co., Torrance, California. Effective July 2, 1943.

[Pencil notation]: Cancelled.

The Industrial Commission of Arizona (Hereinafter called the "Insurance Carrier") does hereby agree with the Employer (hereinafter called the "Employer"), named and described as such in the declarations hereinafter set forth and hereby made a part hereof, to insure the employer against liability under Chapter 56, Article 9, Arizona Code Annotated, 1939, and amendments thereto, known as "Workmen's Compensation Law," including liability to furnish medical and other treatment and care of insured employees as required by said law.

Plaintiff's Exhibit No. 19—(Continued)

Agreements

Compensation Law Made Part of Policy. Liability of Insurance Carrier. Notice of Injury and Claim. Bankruptcy Does Not Discharge Liability

And Agrees: That the provisions of this policy are subject to said law and that all such provisions inconsistent with said law are void; that all of the provisions of the said law, and amendments thereto, shall be and remain a part of this contract as fully and completely as if written herein; that the said Insurance Carrier shall be directly and primarily liable to the employee, or in the event of his death to his dependents, to pay the compensation and accident benefits, if any, for which the employer is liable; that the Industrial Commission, or the State of Arizona, for the benefit of the State Compensation Fund, may enforce in either of their names, either by filing a separate claim or by making the Insurance Carrier a party to the original claim, the liability of the Insurance Carrier in whole or in part for the payment of compensation and accident benefits; that as between the employee and the Insurance Carrier the notice to or knowledge of the occurrence of the injury on the part of the employer shall be deemed notice or knowledge of the Insurance Carrier; that jurisdiction of the Employer shall be jurisdiction of the Insurance Carrier; that the Insurance Carrier shall be bound by and subject to the orders, findings, decisions and awards rendered against the Employer for the payment of

Plaintiff's Exhibit No. 19—(Continued)

compensation and medical benefits; and that the insolvency or bankruptcy of the Employer and his discharge therein shall not relieve the Insurance Carrier from the payment of compensation and medical benefits for injuries or death sustained by an employee during the life of this policy.

Rights of Employees

Employees of the employer, insured under this policy, or their dependents in case death results, shall have the right to enforce in their own names, either by filing a separate claim or by making the insurance carrier a party to the original claim, the liability of the Insurance Carrier in whole or in part, for the payment of compensation and accident benefits—except where exclusive jurisdiction is vested in the Arizona Industrial Commission or the State under the provisions of the Workmen's Compensation Law—provided, however, that payment in whole or in part of such compensation and accident benefits by either the employer or Insurance Carrier shall, to the extent thereof, be a bar to the recovery against the other of the amount so paid.

Extent of Liability

This policy covers the entire liability of the Employer to his employees or their dependents under the Workmen's Compensation Law for all business operations at or from the location set forth in the declarations and work of employees away from said locations which is necessary, incident to, or connected with such described business operations conducted at the location so named. This Policy Does

Plaintiff's Exhibit No. 19—(Continued)

Not Cover the Persons Specifically Excluded from Coverage Under the Policy as Hereinafter Set Forth or Different Kinds of Business Operations Not Described in the Declarations. (Coverage for Additional Kinds of Business Operations May Be Secured by a Formal Written Endorsement to This Policy.)

Indemnity to Employer

And Further Agrees: To indemnify the Employer against loss imposed by law for damages, and to defend, in the name and on behalf of the Employer, claims or suits for such damages, and pay all costs of such defense, provided such injury or death is the result of an injury by accident arising out of and in the course of the employment, and is not purposely self-inflicted, and Provided Such Employee Is Covered by This Policy During the Life Hereof, and provided that such liability for damages is imposed on the Employer by the Workmen's Compensation Law.

Payment of Premium

Unless Otherwise Endorsed on This Policy, the Advance Premium Shall Be Maintained at an Amount Sufficient to Cover at Least Six Months Premium and Shall Be Retained Until the Final Adjustment of Premium Is Made.

Right of Examination

Any member of The Industrial Commission of Arizona or any authorized representative thereof

Plaintiff's Exhibit No. 19—(Continued)

shall have the right and opportunity at all reasonable times until final adjustment of premium for this policy shall have been made, to examine and audit the employers books and records so far as they relate to the remuneration earned by all persons in the service of the employer subject to the provisions of the Workmen's Compensation Law, including contractors, sub-contractors and their employees and the proper payroll classifications therefor. If it shall be ascertained that the total premium paid by the employer, excluding the advance premium, is less than the amount which is properly chargeable to the employer for the period subject to adjustment, the employer shall immediately pay the difference between the total premium paid and the ascertained premium. If the total premium paid by the employer, excluding the advance premium, is in excess of the ascertained premium for the period subject to adjustment, the amount of such excess shall be refunded to the employer, except that such refund shall in no event reduce the premium paid below the Minimum Annual Premium for this policy.

Adjustment of Premium

Adjustment of premium shall be made at such time as The Industrial Commission of Arizona shall require.

No refund of premium shall be payable until the actual earnings of the employees covered by this policy during the period subject to adjustment shall have been ascertained by payroll audit.

Plaintiff's Exhibit No. 19—(Continued)

Revision of Rates

The employer agrees to accept any reductions or any increases in the rate or rates per \$100.00 of earnings which may be promulgated by The Industrial Commission of Arizona and made effective while this policy remains in force.

The effective date of any such reduction or increase shall be determined by The Industrial Commission of Arizona.

Experience and Hazard Rating

Unless otherwise specified by endorsement hereon, the employer agrees to accept and abide by any experience rating plan and/or hazard rating schedule adopted and published by The Industrial Commission of Arizona; and the employer agrees to accept any increase or reduction in the rate or rates required by the application of such experience rating plan and/or hazard rating schedule and further agrees that the effective date of such changes shall be fixed by The Industrial Commission of Arizona.

Notice to Be Served on The Industrial
Commission

Written notice of any injury or death of any employee covered by this policy, or of any claim resulting therefrom, and every notice and process served upon the employer in respect thereto, must be forwarded immediately to The Industrial Commission of Arizona at Phoenix, Arizona.

The Insurance Carrier shall not be chargeable with any settlement or expense incurred by the employer without the consent of a member or

Plaintiff's Exhibit No. 19—(Continued)

authorized representative of The Industrial Commission of Arizona.

Transfer of Policy

The employer or his, or its, heirs, successors or assigns, shall immediately notify the Insurance Carrier, and The Industrial Commission of Arizona, of any transfer of his, or its, ownership in the business covered by this policy.

Cancellation

This policy may be cancelled at any time by the employer when not in arrears for premiums upon written notice served upon The Industrial Commission of Arizona stating that five days after service of said written notice cancellation shall be effective provided said notice shall be accompanied by this policy for cancellation and satisfactory proof that the employer has complied with one or the other alternative methods of securing compensation to his, or its, employees, as prescribed by the Workmen's Compensation Law; this policy shall, however, be subject to cancellation at any time by The Industrial Commission of Arizona; and provided further that no refund shall reduce the premium to be retained below the minimum annual premium for this policy. The registration and deposit in the United States Mails of a cancellation notice addressed to the last known address of the employer as shown by the records of The Industrial Commission of Arizona, signed by a member or authorized representative of the Commission shall be deemed to constitute for

Plaintiff's Exhibit No. 19—(Continued)

this purpose actual delivery of such notice to the employer.

Policy Not Assignable

No assignment of interest under this policy shall bind the Insurance Carrier or constitute a claim on the State Compensation Fund.

Change in Policy

No condition or provision of this policy shall be waived or altered except in writing, or by endorsement hereon, signed by a member of The Industrial Commission of Arizona or a duly authorized representative thereof; or shall notice to any member of The Industrial Commission of Arizona or to any representative thereof, nor shall knowledge possessed by any such person or by any other person be held to effect a waiver or change in any part of this policy. If the employer carries any other insurance covering a claim covered by this policy, he shall not recover from the Insurance Carrier a larger proportion of any such claim, than the sum hereby insured bears to the whole amount of valid and collectible insurance.

This Policy Does Not Cover the Following Unless
Provided by Endorsement Hereon:

Coverage and Exclusions

(1) Any person performing work or accustomed to performing work for the employer without remuneration.

(2) A person engaged in work for the employer who, while so engaged, is independent of the em-

Plaintiff's Exhibit No. 19—(Continued)

ployer in the execution of the work, not subject to the rule or control of the employer, but engaged only in the performance of a definite job or piece of work and subordinate to the employer only in effecting a result in accordance with the employers design.

(3) Agricultural Workers not employed in the use of machinery.

(4) Domestic Servants.

(5) A person whose employment is casual and is not in the usual course of trade, business or occupation of the employer.

(6) Employees who have rejected the terms, conditions and provisions of the Workmen's Compensation Law.

Election

The acceptance of this policy by the employer shall serve as an election on the part of the employer to secure compensation to his, or its, employees as regards all persons whose earnings are required to be reported By the Terms of This Policy under the provisions of Sub-Section 1, Section 56-932 Arizona Code Annotated 1939.

Subrogation

In consideration of the issuance of this policy the employer hereby vests in and grants to the Insurance Carrier irrevocably during the continuance of this policy full power and authority in the employer's name, place and stead, to make all investigations

Plaintiff's Exhibit No. 19—(Continued)

alter, vary or extend any of the stipulations, agreements or limitations of this policy, other than as above stated.

This endorsement, issued by The Industrial Commission of Arizona, when countersigned by a duly authorized officer or representative of the Commission and attached to Policy 10495 issued to Basich Brothers Construction Co. of Alhambra, California shall be valid, and form a part of the policy.

Effective Date: October 3, 1943.

/s/ RAY GILBERT

Chairman

/s/ L. C. HOLMES.

Commissioner

/s/ C. EARL ROGERS

Commissioner

/s/ EARL G. ROOKS

/s/ FRED E. EDWARDS

Countersigned at Phoenix, Arizona Nov. 2, 1943.

/s/ BYRON F. HUNTER,

Authorized Representative

The Industrial Commission of Arizona
Phoenix, Arizona

Endorsement—Effective from 12:01 A.M., October 1, 1943. Amending Policy No. 10495. Issued to: Basich Brothers Construction Co., Torrance, California

Plaintiff's Exhibit No. 19—(Continued)

Anything in this policy to the contrary notwithstanding, it is understood and agreed that as of the effective date hereof Mileage Endorsement attached to this policy providing for percentage increase in the basic rates where the distance of the Employer's operations is five miles or more from the nearest licensed surgical practitioner Is Hereby Declared Null and Void.

Nothing herein contained shall be held to waive, alter, vary or extend any of the stipulations, agreements or limitations of this policy, other than as above stated.

/s/ RAY GILBERT

Chairman

/s/ EARL G. ROOKS

Member

/s/ FRED E. EDWARDS

Member

Countersigned at Phoenix, Arizona, Oct. 1, 1943.

/s/ BYRON F. HUNTER,

Authorized Representative

Plaintiff's Exhibit No. 19—(Continued)

The Industrial Commission of Arizona
Phoenix, Arizona

Endorsement

Anything in this policy to the contrary notwithstanding, it is understood and agreed that effective 12:01 A.M. August 27, 1943, such coverage as is afforded under the terms of this policy is extended to include the operations of the Assured in the construction of roads, Job No. Navajo Ordnance Depot P (5-1) Bellemont, Arizona, Contract No. W 509-Eng. 5529.

Nothing herein contained shall be held to waive, alter, vary or extend any of the stipulations, agreements or limitations of this policy, other than as above stated.

This endorsement, issued by The Industrial Commission of Arizona, when countersigned by a duly authorized officer or representative of the Commission and attached to Policy 10495 issued to Basich Brothers Construction Co. of Alhambra, California shall be valid, and form a part of the policy.

/s/ RAY GILBERT

Chairman

/s/ L. C. HOLMES.

Commissioner

/s/ C. EARL ROGERS

Commissioner

/s/ EARL G. ROOKS

/s/ FRED E. EDWARDS

Countersigned at Phoenix, Arizona, Sep. 13, 1943.

/s/ BYRON F. HUNTER,

Authorized Representative

Plaintiff's Exhibit No. 19—(Continued)

Declaration

(Notice:—"Any Employer Who Misrepresents to the Commission the Amount of Payroll Upon Which the Premium to Be Paid to the Compensation Fund Is Based Shall Be Liable to the State in Ten Times the Amounts of the Difference in Premium Paid and the Amount the Employer Should Have Paid to Be Recovered by Civil Action in the Name of the State and Paid Into the Compensation Fund").
Section 56-977 Arizona Code Annotated 1939.

1. Name of Employer: Basich Brothers Construction Co.
2. P. O. Address: 20530 S. Normandie Ave., Torrance, Calif. Policy No. 10495.
3. The business name of the Employer is: Same as above.
4. The Employer is a Corporation.
* * *
6. The full names, addresses and titles of the officers of the corporation are:

Name and Address	Salaries
R. L. Basich, President, 1670 Oak Knoll Ave., San Marino.....	\$20,000.00
N. L. Basich, Treasurer, 3490 San Pasqual, Pasadena	20,000.00
Jesse S. Smith, 1st Vice-Pres., 444 E. Ross St., Glendale	12,000.00
George W. Kovick, 2nd Vice-Pres., 145 W. Shields Ave., Fresno.....	11,400.00
George J. Popovich, Secretary, 2818 Cincinnati St., Los Angeles.....	10,800.00

If a corporation, state name and address of statutory agent. (All officers reside in California)

Plaintiff's Exhibit No. 19—(Continued)

7. The locations of all plants and work places covered by this policy, and the distance each is from the nearest surgical practitioner are as follows: Army Air Forces Advanced Flying School Yuma, Arizona.
8. The principal products manufactured, handled or sold are: Engaged in the General Construction Industry—no products manufactured.
9. State in the schedule below a description of the work engaged in, the estimated semi-annual payroll, including bonuses, commission, board, lodging and every other form of remuneration. If more than one kind of employment, give estimate of payroll applicable to each:

Plaintiff's Exhibit No. 19—(Continued)

Schedule

Classifi- cation No.	Principal Work of Insured	Esti- mated Semi- Annual Earn- ings of Em- ployees	Rate Per \$100 of Earnings
9079	Restaurants—including musicians, en- tertainers or Clerical Office Employees N.P.D.		\$1.30
1710	Stone Crushing—no quarrying—includ- ing construction, repair, or maintenance of all buildings, structures or equipment; installation of machinery—N.P.D.....	If Any	9.87
5506	Surfacing & Paving Airfields, (rated as)	If Any	5.47
6041	Clearing & Grading Airfields (rated as)	If Any	3.93
6229	Irrigation or Drainage System Construc- tion.—(Pile driving, dredging, guniting, tunneling or dam or sewer construction to be separately rated).....	If Any	6.85
9800	Carpentry—in the construction of mili- tary cantonments—including installation of interior trim, builders' finish or cab- inet work	If Any	3.80
Supplemental Building Schedule Attached			
8810	Clerical office employees.....	If Any	.084
Total Advance Premium.....			\$6,000.00

The minimum premium for this policy, which premium shall cover a period of not more than one year following date of inception of this policy is \$170.00.

In the event employees are required to travel, state the nature and extent thereof; and if board and lodging furnished, so note: We are operat-

Plaintiff's Exhibit No. 19—(Continued)

ing our own commissary on the project; both board and lodging furnished to employees for minimum charge.

10. The estimated payroll as stated above includes the remuneration earned by all persons employed in the service of the employer in connection with employer's business to whom remuneration of any nature in consideration of service is paid, allowed or due.
11. If there shall be any change in or extension of the employer's business or admission of any partners, it shall be immediately reported to The Industrial Commission, and the additional premium, if any, paid forthwith.
12. The following are the Only contractors or lessees of mining property doing or engaged in the performance of work which is a part or process in the trade or business conducted by employer over whose work employer retains supervision or control; and also following are the Only sub-contractors of such contractors or lessees.

No Sub-Contractors employed at present.

13. The following are the Only persons engaged in work for employer and who while so engaged are independent of employer in the execution of such work, not subject to the rule or control of employer but engaged Only in the performance of a definite job or piece of work and subordinate to employer Only in effecting a result in

Plaintiff's Exhibit No. 19—(Continued)
connection with the employer's design, who are not covered by this policy: None.

If the contract is in writing, attach copy. If the contract is oral, state the terms and substance thereof. The employer agrees that the insurance carrier may, at any time, examine the records of the employer in order to ascertain the effect of any contract involving services rendered to the employer within the meaning of the compensation law.

(If, at any time in the future, employer desires coverage for such persons described in declaration No. 13, advise The Industrial Commission by wire and coverage will be effective upon confirmation by The Industrial Commission. In the event employees of contractors or lessees are not covered by this policy, employer should, for his own protection, ascertain that such contractor or lessee has and maintains a policy protecting him against liability to his employees.)

14. The following are the only repairs or maintenance work or new construction work to be done by employees or by contractors covered by this policy: Constructing addition parking apron, Job No. Yuma A (5-3) at Army Air Forces Advanced Flying School, Yuma, Arizona.

(Employer may extend the coverage of the policy to include such above work by notifying the Commission by wire and securing confirmation of such request.)

Plaintiff's Exhibit No. 19—(Continued)

15. An employer should not confuse his liability for compensation and his liability for damages. Coverage without limit against liability for compensation imposed by the Compensation Law (as regards employees covered) is provided by your policy, however, an employer may be liable for damages notwithstanding the issuance of a policy insuring him against liability for compensation, in case he fails to post and keep posted, as provided by law, in a conspicuous place on his premises, available for inspection by his employees, and in all the languages spoken by his employees, a certain notice informing his employees that he has complied with the law and with all the rules and regulations of the Commission, and also informing them that the employer has on hand blanks which any employee may fill out if he elects to reject the terms of the Workmen's Compensation Law. Liability for damages may also be enforced if the employer fails to keep on hand at the place where the employees are hired, as provided by law, a supply of the above-mentioned blanks. The liability for damages may also be enforced against an employer if injury or death is caused by the employer's wilfull misconduct and such misconduct indicates a willful disregard for the life, limb, or bodily safety of the employees, or where he has minors unlawfully employed.

Plaintiff's Exhibit No. 19—(Continued)

Coverage, within limits of \$10,000 for each employee injured or killed and subject to the same limit for each employee, a limit of \$20,000 by reason of an accident involving the injury or death of more than one employee is provided for.

In addition to your compensation insurance, do you desire insurance above said limits against such liability for damages for personal injury to your employees under the common law, the Arizona Employer's Liability Law or other statutes? Yes..... No.....

(For other limits and other cost write the Commission.)

16. This insurance shall take effect on the 2nd day of July, 1943 at 12:01 A.M. Standard Time.
17. Premiums on insurance coverage on all employees whose earnings are in excess of \$500.00 per month will be in excess of the manual rates and will be determined in accordance with the rules and regulations of The Industrial Commission of Arizona.
18. This policy is a continuous policy and does not expire except upon cancellation by either the employer or The Industrial Commission of Arizona as hereinbefore provided.
19. Remarks: Monthly payrolls to be submitted.
20. This Insurance is for Workmen's Compensation Insurance and/or Occupational Disease Disability Insurance and the information submitted herewith is intended to apply jointly or sever-

Plaintiff's Exhibit No. 19—(Continued)
ally as applicable to both or either of the Acts
governing above Insurance Policies.

Sign here.....Employer

By.....

Date.....

In Witness Whereof, The Industrial Commission
of Arizona has caused this policy to be signed by the
members thereof, but the same shall not be binding
unless countersigned by a duly authorized officer or
representative of the Commission.

/s/ RAY GILBERT

Chairman

/s/ FRED E. EDWARDS

/s/ L. C. HOLMES

Commissioner

/s/ C. EARL ROGERS

Commissioner

/s/ EARL G. ROOKS

Countersigned at Phoenix, Arizona, the 20th day
of July, 1943 at 12:01 A.M. Standard Time.

/s/ BYRON F. HUNTER, HFH

Authorized Representative

Plaintiff's Exhibit No. 19—(Continued)

Supplemental Schedule

Code No.	Classification	Esti- mated Semi- Annual Earn- ings of Em- ployees	Rate Per \$100 of Earn- ings
5645	Carpentry—all carpentry, incident to the construction of private residences for one or two families and dwellings of not exceeding three stories in height, including private garage connected therewith	If Any	\$3.80
5645	Carpentry—installation of interior trim, builders' finish and cabinet work only, incident to the construction of private or public buildings	If Any	3.80
5403	Carpentry—(Not Otherwise Classified)..	If Any	9.50
5610	Cleaners—engaged in the removal of debris in connection with new building construction—No Payroll Division if the work of the assured at a specific job or location is covered by a single construction or erection classification.....	If Any	4.30
5502	Concrete Construction — Floors, Sidewalk, Cellar Floors or Driveways—not reinforced—including calking or the installation or repair of light prisms—No Payroll Division with 5213—"Concrete Construction—Not Otherwise Classified" and 5203 — "Concrete Construction—Bridges or Culverts.".....	If Any	2.41

Plaintiff's Exhibit No. 19—(Continued)

5213	Concrete Construction—(Not Otherwise Classified) — including foundations, or the making, setting up or taking down forms, scaffolds, or the making, setting up or taking down forms, scaffolds, false work or concrete distributing apparatus—No Payroll Division with 5203—“Concrete Construction — Bridges or Culverts”; or 5506 or 5507 “Street or Road Construction.”—(Excavation; pile driving; all work in sewers, tunnels, subways, caissons or coffer-dams to be separately rated).	If Any	9.00
5103	Door, Door Frame or Sash Erection or Repair—metal or metal covered.....	If Any	4.12
5190	Electrical Wiring — within buildings—including installation or repair of fixtures or appliances.—(Installation of electrical machinery or auxiliary apparatus to be separately rated).	If Any	3.00
5649	Excavation—for cellars or foundations in connection with private residences or dwellings, excluding mass rock excavation.	If Any	4.18
6219	Excavation—for cellars or foundations of buildings, bridges, retaining walls or dams—excluding mass rock excavation, pile driving, shaft sinking, caisson or coffer-dam work.	If Any	7.22
5646	Masonry—all masonry, adobe, concrete, or stucco work incident to the construction of private residences for one or two families and dwellings of wood construction not exceeding three stories in height, including private garages connected therewith.	If Any	5.91
5022	Masonry—(Not Otherwise Classified.)....	If Any	5.91

Plaintiff's Exhibit No. 19—(Continued)

5474	Painting, Decorating or Paper Hanging—Not Otherwise Classified—including shop operations — (Painting steel structures or bridges to be separately rated).	If Any	5.60
5443	Lathing—metal or wood.....	If Any	4.30
5480	Plastering—(Not Otherwise Classified). ..	If Any	3.78
5183	Plumbing—Not Otherwise Classified—gas, steam, hot water or other pipe fittings—including house connections with incidental excavation; shop operations.—(Automatic sprinkler installation to be separately rated).	If Any	2.54
5551	Roofing—all kinds—including yard employees.	If Any	10.35
6306	Sewer Construction—all operations—including tunneling at street crossings when not performed under air pressure.—(All other tunneling to be separately rated).	If Any	10.61
5538	Sheet Metal Work—Erection, Installation or Repair (Not Otherwise Classified)—shop and outside—galvanized iron, sheet iron, corrugated iron, tin or copper.—(Roofing to be separately rated)... ..	If Any	4.80
	Total Advance Premium.....		

The Industrial Commission of Arizona
Phoenix, Arizona

Endorsement

Anything in this policy to the contrary notwithstanding, it is understood and agreed that additional coverage within limits of \$100,000.00 for each employee injured or killed, and subject to the same limit for each employee, a limit of \$300,000.00 by reason of an accident involving the injury or death

Plaintiff's Exhibit No. 19—(Continued)

5213	Concrete Construction—(Not Otherwise Classified) — including foundations, or the making, setting up or taking down forms, scaffolds, or the making, setting up or taking down forms, scaffolds, false work or concrete distributing apparatus—No Payroll Division with 5203—"Concrete Construction — Bridges or Culverts"; or 5506 or 5507 "Street or Road Construction."—(Excavation; pile driving; all work in sewers, tunnels, subways, caissons or coffer-dams to be separately rated).	If Any	9.00
5103	Door, Door Frame or Sash Erection or Repair—metal or metal covered.....	If Any	4.12
5190	Electrical Wiring — within buildings—including installation or repair of fixtures or appliances.—(Installation of electrical machinery or auxiliary apparatus to be separately rated).	If Any	3.00
5649	Excavation—for cellars or foundations in connection with private residences or dwellings, excluding mass rock excavation.	If Any	4.18
6219	Excavation—for cellars or foundations of buildings, bridges, retaining walls or dams—excluding mass rock excavation, pile driving, shaft sinking, caisson or coffer-dam work.	If Any	7.22
5646	Masonry—all masonry, adobe, concrete, or stucco work incident to the construction of private residences for one or two families and dwellings of wood construction not exceeding three stories in height, including private garages connected therewith.	If Any	5.91
5022	Masonry—(Not Otherwise Classified.)....	If Any	5.91

Plaintiff's Exhibit No. 19—(Continued)

5474	Painting, Decorating or Paper Hanging—Not Otherwise Classified)—including shop operations — (Painting steel structures or bridges to be separately rated).	If Any	5.60
5443	Lathing—metal or wood.....	If Any	4.30
5480	Plastering—(Not Otherwise Classified). ..	If Any	3.78
5183	Plumbing—Not Otherwise Classified—gas, steam, hot water or other pipe fittings—including house connections with incidental excavation; shop operations.— (Automatic sprinkler installation to be separately rated).	If Any	2.54
5551	Roofing—all kinds—including yard employees.	If Any	10.35
6306	Sewer Construction—all operations—including tunneling at street crossings when not performed under air pressure.—(All other tunneling to be separately rated).	If Any	10.61
5538	Sheet Metal Work—Erection, Installation or Repair (Not Otherwise Classified)—shop and outside—galvanized iron, sheet iron, corrugated iron, tin or copper.—(Roofing to be separately rated)... ..	If Any	4.80
	Total Advance Premium.....		

The Industrial Commission of Arizona
Phoenix, Arizona

Endorsement

Anything in this policy to the contrary notwithstanding, it is understood and agreed that additional coverage within limits of \$100,000.00 for each employee injured or killed, and subject to the same limit for each employee, a limit of \$300,000.00 by reason of an accident involving the injury or death

Plaintiff's Exhibit No. 19—(Continued)
of more than one employee, is provided for all liabilities covered in item 15 of the declaration.

In consideration therefor, it is further understood and agreed that during the time this endorsement is in effect, there shall be added to the rate or rates of premium otherwise applicable to the policy Twenty-Seven (27%) per cent of the fund rate for each classification.

Nothing herein contained shall be held to waive, alter, vary or extend any of the stipulations, agreements or limitations of this policy, other than as above stated.

This endorsement, issued by The Industrial Commission of Arizona, when countersigned by a duly authorized officer or representative of the Commission and attached to Policy 10495 issued to Basich Brothers Construction Co. of Torrance, Cal. shall be valid, and form a part of the policy.

Effective Date: 12:01 A.M. July 2, 1943.

/s/ RAY GILBERT

Chairman

/s/ FRED E. EDWARDS

/s/ L. C. HOLMES

Commissioner

/s/ C. EARL ROGERS

Commissioner

/s/ EARL G. ROOKS

Countersigned at Phoenix, Arizona, July 20, 1943.

/s/ BYRON F. HUNTER AJ

Authorized Representative

Plaintiff's Exhibit No. 19—(Continued)

The Industrial Commission of Arizona
Phoenix, Arizona

Arizona Occupational Disease Disability Law Endorsement. (To Provide Occupational Disease Coverage to Existing Workmen's Compensation Insurance Policies.)

1. Anything in this policy to the contrary notwithstanding, it is understood and agreed that effective 12:01 A.M. July 2, 1943 the obligations of the policy to which this endorsement is attached and made a part thereof shall apply to the Arizona Occupational Disease Disability Law herein cited:

Chapter 26, House Bill 25, Laws 16th Legislature. Regular Session (1943) State of Arizona, known and cited as "Arizona Occupational Disease Disability Law" and all laws amendatory thereof which may become effective while this policy is in force, hereinafter referred to as "this Act."

2. Insurance afforded under this policy in its application to this Act is separate and distinct from, and may be cancelled independently of any insurance which may be afforded under the Workmen's Compensation Law of Arizona. Such independent cancellation may be effected by cancellation of this endorsement in the same manner that the policy in its entirety may be cancelled.

3. In the application of insurance with respect to this Act, wherever they occur in the policy of insurance, the words following:

Plaintiff's Exhibit No. 19—(Continued)

(a) "Injury," "injuries" and "injury by accident" wherever used in this policy, mean disability or death from an occupational disease under this Act and does not mean injury or death by accident; and

(b) "Compensation Law," "Workmen's Compensation Law" and "Chapter 56, Article 9, Arizona Code Annotated, 1939, and amendments thereto known as Workmen's Compensation Law" mean this Act, and "Sub-Section 1, Section 56-932 Arizona Code Annotated 1939" means Section 16 of this Act; and "Section 56-977 Arizona Code Annotated 1939" means Section 30 of this Act; and

(c) "State Compensation Fund" and "Compensation Fund" mean The State Occupational Disease Compensation Fund; and

(d) "Accident Benefits" mean medical service, hospitalization and medicines to which a disabled employee is entitled under this Act; and

(e) "Compensation" means the benefits prescribed by Section 15 of the Arizona Occupational Disease Disability Law.

4. In the application of insurance to this Act:

(a) Item 13 of the Declaration and lines 115 to 118, inclusive, of the policy are amended to provide coverage under this Act, for all subcontractors and their employees who employ less than three employees during such time as the

subcontractor is engaged in the performance of work under subcontract with the Employer.

(b) Line 119 of the policy is amended to read, “(3) Agricultural Workers.”

(c) Item 17 of the Declaration of the policy is eliminated.

5. Item 15 of the Declaration of the policy referring to damage liability is applicable insofar as the same applies to this Act; and in addition to coverage against liability for compensation imposed by the Arizona Occupational Disease Disability Law (as regards employees covered) coverage for damage assessed by law under the provisions of Section 49, 58 and 60 of this Act, is provided with limits of \$5,000.00 on account of occupational disease, including death at any time resulting therefrom, sustained by any one employee, and subject to such limit with respect to each such employee, to \$20,000.00 on account of occupational disease, including death at any time, resulting therefrom, sustained by all employees during one calendar year.

6. The Employer shall pay the premium specified in the Endorsement in addition to the premium specified elsewhere in the policy on the basis of the classifications and rates stated in the schedule below. The premium determined in accordance with the provisions of this Endorsement is subject otherwise to all the terms of the policy, excepting standard “Salary Endorsement” and “Mileage Endorsement” which are or may be attached to this policy, and which have no application to rates under this Act.

Plaintiff's Exhibit No. 19—(Continued)

Schedule

Note: For complete statement of Classification Wording and Estimated Semi-Annual Payroll refer to Policy Declaration.

Code Number for Classification of Work	Rate Per \$100 of Payroll
1710	\$0.17
5506	0.02
6041	0.02
6229	0.02
8810	0.01

Minimum Premium \$3.00

Estimated Advance Deposit To be billed.

7. Nothing herein contained shall be held to waive, alter, vary or extend any of the stipulations, agreements or limitations of this policy other than as above stated.

8. This endorsement issued by The Industrial Commission of Arizona, when countersigned by a duly authorized officer or representative of the Commission and attached to Policy 10495 issued to Basich Brothers Construction Co. of Torrance, California shall be valid, and form a part of the policy.

/s/ RAY GILBERT

Chairman

/s/ EARL G. ROOKS

Commissioner

/s/ FRED E. EDWARDS

Commissioner

Countersigned at Phoenix, Arizona, July 20, 1943.

/s/ BYRON F. HUNTER EN

Authorized Representative

Plaintiff's Exhibit No. 19—(Continued)

The Industrial Commission of Arizona
Phoenix, Arizona

Endorsement

Anything in this policy to the contrary notwithstanding, it is understood and agreed that the rate of premium applicable to the payroll of any employee covered by this policy and receiving in excess of \$500.00 monthly, shall be determined by multiplying the rates otherwise applicable to the class of work performed by such employee by the figures shown in the following schedule, and the resultant rate shall apply to the entire payroll of such employee:

Monthly Rate of Pay	(Pencil Notation)	Multiply Rate Other- wise Applicable by Figure Below:
\$ 500.00 to \$ 599.00—Basic rate only	$\times 1.25$	1.25
600.00 to 699.00—Basic rate only		1.51
700.00 to 799.00—Basic rate only		1.89
800.00 to 949.00—Basic rate only		2.21
950.00 to 1199.00—Basic rate only		2.68
1200.00 to 1499.00—Basic rate only		3.24
1500.00 to 1999.00—Basic rate only		4.92
2000.00 and over—Basic rate only		6.31

Nothing herein contained shall be held to waive, alter, vary or extend any of the stipulations, agreements or limitations of this policy, other than as above stated.

Plaintiff's Exhibit No. 19—(Continued)

This endorsement, issued by The Industrial Commission of Arizona, when countersigned by a duly authorized officer or representative of the Commission and attached to Policy No. 10495 issued to Basich Brothers Construction Co. of Torrance, Cal. shall be valid, and form a part of the policy.

Date Effective: July 2, 1943.

/s/ RAY GILBERT

Chairman

/s/ FRED E. EDWARDS

/s/ L. C. HOLMES

Commissioner

/s/ C. EARL ROGERS

Commissioner

/s/ EARL G. ROOKS

Countersigned at Phoenix, Arizona, July 20, 1943.

/s/ BYRON F. HUNTER EN

Authorized Representative

Plaintiff's Exhibit No. 19—(Continued)

The Industrial Commission of Arizona
Phoenix, Arizona

Endorsement

The schedule of rates otherwise applicable to this policy shall be increased in accordance with the following schedule:

Distance from Nearest Licensed Surgical Practitioner:							Increase in Basic Rates:
5 to	10 miles	(not including	10 miles)				5%
10 to	15	"	"	"	15	"	10%
15 to	20	"	"	"	20	"	15%
20 to	30	"	"	"	30	"	20%
30 to	50	"	"	"	50	"	25%
50 to	75	"	"	"	75	"	30%
75 to	100	"	"	"	100	"	35%
100 to	125	"	"	"	125	"	40%
125 to	150	"	"	"	150	"	45%
150 to	200	"	"	"	200	"	50%

Nothing herein contained shall be held to waive, alter, vary or extend any of the stipulations, agreements or limitations of this policy, other than as above stated.

This endorsement, issued by The Industrial Commission of Arizona, when countersigned by a duly authorized officer or representative of the Commission and attached to Policy No. 10495 issued to

Plaintiff's Exhibit No. 19—(Continued)
Basich Brothers Construction Co. of Torrance, Cal.
shall be valid, and form a part of the policy.

Date Effective: July 2, 1943.

/s/ RAY GILBERT

Chairman

/s/ FRED E. EDWARDS

/s/ L. C. HOLMES

Commissioner

/s/ C. EARL ROGERS

Commissioner

/s/ EARL G. ROOKS

Countersigned at Phoenix, Arizona, July 20, 1943.

/s/ BYRON F. HUNTER EN

Authorized Representative

[Endorsed]: U. S. D. C. Received in evidence
Oct. 14, 1946.

PLAINTIFF'S EXHIBIT No. 20

Construction Contract, War Department. Form
No. 2. Contract No. W-04-353-Eng.-1302.
Original. Job No. 19 Tucson.

Contractor & Address:

Basich Brothers Construction Co.,
P. O. Box 151,
600 South Fremont, Avenue,
Alhambra, California.

Contract for:

Taxiways, Warm-Up and Parking Aprons,
Job No. Davis-Monthan ESA 210-6, 210-8 and
210-9.

Approx. Amount:

\$942,816.00.

Location:

Davis-Monthan Field,
Tucson, Arizona.

Payment: To be made by Finance Officer, United
States Army, at 824 South Western Avenue,
Los Angeles, California.

The supplies and services to be obtained by this
instrument are authorized by, are for the purposes
set forth in, and are chargeable to the following
allotments, the available balances of which are suffi-
cient to the cover the cost of the same.

212/50905 50-1327 P210-10 S-04-353.

This contract is authorized by the following laws: First War Powers Act, 1941, Act of 18 December 1941, (Public Law 354 - 77th Cong.), and Executive Order No. 9001, dated 27 December 1941.

This Contract, entered into this 25th day of January, 1945, by the United States of America (hereinafter called the Government) represented by the Contracting Officer executing this contract, and Basich Brothers Construction Co., a corporation organized and existing under the laws of the State of California of the city of Alhambra in the State of California (hereinafter called the Contractor), witnesseth that the parties hereto do mutually agree as follows:

Article 1. Statement of work.—The contractor shall furnish the materials, and perform the work (except materials and equipment designated to be furnished by the Government) for constructing taxiways, warm-up and parking aprons, airfield lighting, drainage facilities, and water service lines, together with appurtenant facilities, Job No. Davis-Monthan ESA 210-6, 210-8 and 210-9, at Davis-Monthan Field, Tucson, Arizona, for the consideration of the schedule of payment hereto attached, and in strict accordance with the specifications, schedules and drawings, all of which are made a part hereof and designated as follows: Invitation No. 45-79, dated 29 December 1944, Addendum No. 1, dated 4 January 1945, Addendum No. 2, dated 8 January 1945, Addendum No. 3, dated 12 January

1945, Addendum No. 4, dated 13 January 1945, Addendum No. 5, dated 17 January 1945, and drawings as listed therein. The work shall be commenced on or before 26 January 1945, and shall be completed in accordance with paragraph SC-13 of the specifications.

Article 17. Rate of Wages.—(In accordance with the act of August 30, 1935, 49 Stat. 1011, as amended by the act of June 15, 1940, 54 Stat. 399 (U. S. Code, title 40, secs. 276 a and 276a-1), this article shall apply if the contract is in excess of \$2,000 in amount and is for the construction, alteration, and/or repair, including painting and decorating, of a public building or public work within the geographical limits of the States of the Union, the Territory of Alaska, the Territory of Hawaii, or the District of Columbia.)

(a) The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less or more than those stated in the specifications (subject to Executive Order Number 9250 and the General Orders and Regulations issued thereunder) regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics; and the scale of wages to be paid shall be posted by the contractor in a prominent and

easily accessible place at the site of the work. The contracting officer shall have the right to withhold from the contractor so much of accrued payments as may be considered necessary by the contracting officer to pay to laborers and mechanics employed by the contractor or any subcontractor on the work the difference between the rates of wages required by the contract to be paid laborers and mechanics on the work and the rates of wages received by such laborers and mechanics and not refunded to the contractor, subcontractors, or their agents.

(b) In the event it is found by the contracting officer that any laborer or mechanic employed by the contractor or any subcontractor directly on the site of the work covered by the contract has been or is being paid a rate of wages less than the rate of wages required by the contract to be paid as aforesaid, the Government may, by written notice to the contractor, terminate his right to proceed with the work or such part of the work as to which there has been a failure to pay said required wages and prosecute the work to completion by contract or otherwise, and the contractor and his sureties shall be liable to the Government for any excess costs occasioned the Government thereby.

(c) The regulations of the Secretary of Labor, referred to in article 19 hereof, allow certain "permissible deductions" from the wages required by this article to be paid.

Article 19. Nonrebate of Wages.—The contractor shall comply with the regulations of the Secretary of Labor pursuant to the Act of June 13, 1934, 48 Stat. 948 (U. S. Code, title 40, secs. 276b and 276c), and any amendments or modifications thereof, shall cause appropriate provisions to be inserted in subcontracts to insure compliance therewith by all subcontractors subject thereto, and shall be responsible for the submission of affidavits required of subcontractors thereunder, except as the Secretary of Labor may specifically provide for reasonable limitations, variations, tolerances, and exemptions from the requirements thereof.

Article 25. Anti-Discrimination.—(a) The Contractor in performing the work required by this contract, shall not discriminate against any employee or applicant for employment because of race, creed, color, or national origin.

(b) The Contractor agrees that the provision of paragraph (a) above will also be inserted in all of its subcontracts. For the purpose of this article, a subcontract is defined as any contract entered into by the contractor with any individual, partnership, association, corporation, estate, or trust, or other business enterprise or other legal entity, for a specific part of the work to be performed in connection with the supplies or services furnished under this contract; provided, however, that a con-

tract for the furnishing of standard or commercial articles or raw material shall not be considered as a subcontract.

In Witness Whereof, the parties hereto have executed this contract as of the day and year first above written.

THE UNITED STATES OF
AMERICA,

By /s/ O. H. OCHSNER,
Lt. Col., Corps of Engineers,
Contracting Officer.

BASICH BROTHERS CON-
STRUCTION CO.,

By /s/ N. L. BASICH.
P. O. Box 151, 800 South Fre-
mont Avenue, Alhambra,
California.

Two Witnesses:

DEEMI COULSON,
617 S. La Paloma.

MILDRED GRIFFIN,
525 S. La Paloma.

I, G. J. Popovich, certify that I am the Secretary of the corporation named as Contractor herein; that N. L. Basich, who signed this contract on behalf of the Contractor was then President of said corporation; that said contract was duly signed for and on behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.

In Witness Whereof, I have hereunto affixed my hand and the seal of said corporation this 19th day of February, 1945.

[Seal] /s/ G. J. POPOVICH,
Secretary.

War Department, United States Engineer Office,
751 South Figueroa Street, Los Angeles, California

17 January 1945

Addendum No. 5

I. The Specifications. Invitation No. 45-79, dated 29 December 1944, covering "Taxiways, Warm-Up and Parking Aprons, Job No. Davis Monthan ESA 210-6, 210-8 and 210-9, at Davis-Monthan Field, Tucson, Arizona, Addendum No. 2 dated 8 January 1945, Addendum No. 3 dated 12 January 1945, and Addendum No. 4 dated 13 January 1945, and the drawings are further modified as follows:

Specifications

(52) Page 2, paragraph 2.

a. Subparagraph (b). To the subparagraph, add the following:

The minimum thickness of gravel base course under conforms shall be six (6) inches. Where base courses of less than 6-inch thickness are indicated on drawings or required, asphaltic binder course or courses shall be used; any indications or notes to the contrary on the drawings shall be disregarded.

b. Subparagraph (c) (2) c, line 1. Delete "replacement" and insert reinforcement.

(53) Page 3, subparagraph 3 (a), Schedule of Work Items.

a. Item 17. Delete "154,800" and insert 75,000.

b. Item 18. Delete "17,000" and insert 75,000.

(54) Pages S-10 and S-11, subparagraph SC-7 (a). After "1059/38", "1059/53," and "1059/54" insert Revision A 1/17/45.

(55) Page S-18, SC-13, line 2. Delete "ninety (90)" and insert one hundred and thirty (130).

(56) Page II-3, subparagraph 2-04 (d), lines 19 to 21, inclusive. Delete "not more * * * sections," and insert the following:

of six (6) inches in thickness or less, as directed by the Contracting Officer, for the full width of the cross sections.

GC-7. Subcontractors. The Contractor shall within five (5) days, or within such time as determined by the Contracting Officer, after the date of this contract notify the Contracting Officer in writing of the names of all subcontractors proposed for the work, the extent of the work to be done by each, and the general terms and conditions of each proposed subcontract. If, for sufficient reason, at any

time during the progress of the work, the Contracting Officer determines that any subcontractor is incompetent or undesirable, he will notify the Contractor accordingly and immediate steps will be taken for cancellation of such subcontract. Subletting by subcontractors shall be subject to the same regulations. Nothing contained in this contract shall create any contractual relation between any subcontractor and the Government.

SC-1. Rates of Wages.

(a) The minimum wages to be paid laborers and mechanics on this project, as determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the pertinent locality, are as set forth below.

(b) Any class of laborers and mechanics not listed below employed on this contract shall be classified or reclassified conformably to the schedule set out below by mutual agreement between the contractor and class of labor concerned, subject to the prior approval of the Contracting Officer. In the event the interested parties cannot agree on the proper classification or reclassification of a particular class of laborers and mechanics to be used, the question, accompanied by the recommendation of the Contracting Officer, shall be referred to the Secretary of Labor for final determination. The wages specified in this schedule shall be the maximum wages to be paid, subject, however, to Executive Order No. 9250 and the General Orders and Regulations issued thereunder.

Pima County, Arizona

Classification of Laborers and Mechanics	Minimum Rates of Wages Per Hour
Adobe layers	\$1.65
Air tool operators (vibrators).....	.90
Air tool operators (jackhammermen).....	1.00
Asbestos workers	1.50
Asphalt rakers and ironers.....	1.10
Asphalt header boardmen	1.10
Blacksmiths	1.375
Blacksmiths' helpers	1.00
Boilermakers	1.50
Boilermakers' helpers	1.25
Bricklayers	1.65
Bricklayers' tenders	1.00
Carpenters, journeymen	1.35
Carpenter's apprentices:	
1st year .....	.75
2nd year .....	.875
3rd year	1.00
4th year	1.25
Calkers (sewer pipe)	1.125
Casters	1.95
Cement block layers	1.775
Cement finishers	1.375
Cement finishers' tenders	1.125
Cement finishing machine operators	1.50
Concrete road form setters	1.375
Curb, gutter, and sidewalk form setters.....	1.375
Distributor drivers	1.125
Distributor operators	1.125
Drillers, core, diamond	1.00
Drillers, wagon	1.00
Dumpmen and spotters .....	.90
Dumtper drivers, less than 7 cu. yd., w.l.e.....	1.125
Dumtper drivers, 7 cu. yd. or over w.l.e.....	1.25
Gunite groundmen	1.25
Gunite gunmen	1.00
Gunite nozzlemen	1.25
Gunite nozzlemen's helpers .....	.90
Gunite rodmen	1.25
Gunite mixermen	1.00

Classification of Laborers and Mechanics	Minimum Rates of Wages Per Hour
Electricians (wiremen and linemen).....	\$ 1.50
Electricians' apprentices:	
1st 6 months .....	.50
2nd 6 months.....	.625
3rd 6 months .....	.75
4th 6 months .....	.875
5th 6 months	1.00
6th 6 months	1.125
7th 6 months	1.25
8th 6 months	1.375
Elevator constructors	1.53
Elevator constructors' helpers	1.07
Fireproofers	1.65
Glaziers	1.25
Highway stoneworkers	1.25
Ironworkers, structural	1.50
Ironworkers, ornamental	1.50
Ironworkers, reinforcing	1.375
Laborers .....	.825
Laborers, concrete .....	.90
Lathers, metal	1.50
Lathers, wood	1.50
Machinists	1.375
Machinists' helpers .....	.975
Marble setters	1.65
Marble setters' helpers .....	.875
Millwrights	1.375
Miners (underground construction)	1.10
Mortar mixers	1.125
Mosaic workers	1.65
Mosaic workers' helpers .....	.875
Painters, brush	1.25
Painters, spray	1.625
Painters, structural steel	1.50
Pile drivers	1.375
Pile drivers (lead and hold men).....	1.375
Pipe layers, sewer	1.25
Pipe wrappers	1.25
Pipe wrappers' helpers.....	1.00
Plasterers	1.50

Classification of
Laborers and
Mechanics

Minimum Rates of
Wages Per Hour

Plasterers' tenders	\$ 1.25
Plumbers	1.50
Plumbers' apprentices:	
1st 6 months 25% of journeymen's rate	
2nd 6 months 32% of journeymen's rate	
3rd 6 months 35% of journeymen's rate	
4th 6 months 40% of journeymen's rate	
5th 6 months 45% of journeymen's rate	
6th 6 months 50% of journeymen's rate	
7th 6 months 57.5% of journeymen's rate	
8th 6 months 65% of journeymen's rate	
9th 6 months 72.5% of journeymen's rate	
10th 6 months 80% of journeymen's rate	
Powdermen (blasters)	1.25
Power saws (sawyers)	1.50
Power equipment operators:	
Air compressors, stationary	1.25
Air compressors, portable-type.....	1.00
Apprentice engineers (oilers, firemen, greasers).....	.975
Apprentice engineers (tractors, less than 50 hp. with- out bulldozers, carry-alls, and similar attachments)	1.00
Asphalt or concrete spreading machines.....	1.25
Asphalt plant engineers or drier firemen.....	1.375
Asphalt plant mixers.....	1.375
Batch plants	1.25
Cableways	1.625
Carry-alls, tandem	1.625
Concrete mixers (paving-type).....	1.50
Concrete mixers (skip-type)	1.125
Concrete mixers (central).....	1.50
Cranes, derricks	1.50
Crushers	1.375
Distributors (bituminous surfaces).....	1.125
Hoists, material	1.375
Material loaders (conveyors).....	1.25
Mechanics (heavy duty repairmen).....	1.375
Motor graders	1.50
Overhead electric cranes	1.375
Pile drivers	1.50
Pull or tow graders	1.25

Classification of Laborers and Mechanics	Minimum Rates of Wages Per Hour
Pumps	\$ 1.00
Pumperetes	1.375
Road oil mixing machines	1.50
Rollers	1.25
Shovels, with any or all attachments.....	1.625
Statinary engineers	1.125
"Tourneau" pulls	1.625
Tractor, high lift shovel, 1 cu. yd. and over.....	1.50
Tractors, high lift shovel, less than 1 cu. yd.....	1.375
Tractors, 50 hp. and over with bulldozers, carry-alls, and similar attachments	1.50
Tractors, less than 50 hp. with bulldozers, carry-alls, and similar attacahments.....	1.25
Trenching machines, smaller than No. 224 "Buck- eye"	1.375
Trenching machines, No. 224 "Buckeye" or larger....	1.50
Well drillers and boring machines.....	1.25
Linoleum layers	1.375
Linoleum tile setters (rubber, mastic, etc.).....	1.50
Roofers	1.25
Roofers' helpers .....	.875
Sandblasters (nozzlemen)	1.125
Sandblasters (pot tenders)	1.00
Sheet metal workers.....	1.25
Spreader boxmen .....	.925
Steam fitters	1.50
Steam fitters' apprentices:	
1st 6 months 25% of journeymen's rate	
2nd 6 months 32% of journeymen's rate	
3rd 6 months 35% of journeymen's rate	
4th 6 months 40% of journeymen's rate	
5th 6 months 45% of journeymen's rate	
6th 6 months 50% of journeymen's rate	
7th 6 months 57.5% of journeymen's rate	
8th 6 months 65% of journeymen's rate	
9th 6 months 72.5% of journeymen's rate	
10th 6 months 80% of journeymen's rate	
Stone or granite cutters.....	1.25
Stonemasons	1.65
Stonemasons' helpers .....	.875

Classification of Laborers and Mechanics	Minimum Rates of Wages Per Hour
Teamsters (2 or 4 up).....	\$.95
Tank builders	1.50
Tank builders' helpers	1.25
Terrazzo workers	1.65
Terrazzo workers' helpers .....	.875
Tile setters	1.65
Tile setters' helpers .....	.875
Timbermen	1.125
Truck drivers, 13 cu. yd. and over.....	1.20
Truck drivers, 7 cu. yd., w.l.c. but less than 13 cu. yd...	1.125
Truck drivers, over 1½ tons m.r.c. and over 3 cu. yd., but less than 7 cu. yd.	1.00
Truck drivers, 1½ tons m.r.c. and 3 cu. yd. or less.....	.85
Truck drivers, oil and water tankers (2,250 gal. or less) .....	.925
Truck drivers, oil and water tankers (over 2,250 gal.) exclusive of trucks or trailers or semi-trailers.....	1.00
Truck drivers, transit mix, 4 cu. yd. or less.....	1.125
Truck drivers, on trucks and trailers or semi-trailers, under 9 tons pay load.....	1.00
Truck drivers, on truck and trailers or semi-trailers 9 tons pay load or over.....	1.125
Truck drivers, flat rack dump.....	.95
Truck drivers, lumber carriers	1.375
Truck servicemen (repairmen).....	.95
Welders—receive rate prescribed for craft performing operation to which welding is incidental.	

SC-5. Payments will be made semi-monthly in accordance with Article 16 of the contract.

SC-6. Bonds.

(a) Payment Bond. If the contract exceeds two thousand dollars (\$2,000.00), the contractor agrees to furnish a payment bond with good and sufficient surety or sureties acceptable to the Government for the protection of persons furnishing material or labor in connection with the performance of the work under this agreement on U. S. Standard Form No. 25-A or U. S. Standard Form

No. 25-C. The penal sum of such payment bond will be as follows: (1) When the contract price is one million dollars (\$1,000,000.00) or less, fifty per cent (50%) of the contract price; (2) When the contract price is in excess of one million dollars (\$1,000,000.00) and less than five million dollars (\$5,000,000.00) forty per cent (40%) of the contract price; (3) When the contract price is five million dollars (\$5,000,000.00) or more, two million five hundred thousand dollars (\$2,500,000.00).

(b) Performance Bond. If the contract price exceeds two thousand dollars (\$2,000.00), the contractor further agrees to furnish a performance bond with good and sufficient surety or sureties acceptable to the Government in connection with the performance of the work under this agreement on U. S. Standard Form No. 25 or U. S. Standard Form No. 25-B. The penal sum of such performance bond will be ten per cent (10%) of the contract price.

(c) Any bonds required hereunder will be dated as of the same date as the contract and will be furnished by the contractor to the Government at the time the contract is executed.

SC-13. Commencement and Completion of Work. The contractor will be required to commence work under this contract within one (1) calendar day after the date of the contract, to prosecute said work with faithfulness and energy, and to complete the entire work ready for use not later than ninety (90) days after commencement thereof. The time stated for completion shall include final clean-up of the premises.

PLAINTIFF'S EXHIBIT No. 21

In the District Court of the United States for the
Southern District of California, Central
Division

No. 5021-PH

BASICH BROTHERS CONSTRUCTION COM-
PANY, a Corporation,

Plaintiff,

vs.

GLENS FALLS INDEMNITY COMPANY, a
Corporation, et al.,

Defendants.

STIPULATION TO TAKE DEPOSITION

It Is Hereby Stipulated and Agreed by and between the respective parties to the above-entitled action, that the testimony of Nick L. Basich, a witness on the part of defendant Glens Falls Ind. Co., in such cause, be taken before C. W. McClain or other Notary Public in and for the County of Los Angeles, State of California, on Friday, the 21st day of June, 1946, commencing at the hour of 2:00 o'clock p.m., at Suite 1050, Petroleum Bldg., 714 West Olympic Blvd., Los Angeles, California, and, if not completed on said day, it may be continued from day to day thereafter until completed.

It is further stipulated that the testimony may be written down in shorthand by a shorthand reporter

Plaintiff's Exhibit No. 21—(Continued)

and thereafter written out in typewriting, and may be read and corrected by the witness, and may be signed and sworn to by the witness before any Notary Public, and that the said deposition and testimony, when so taken, may be read and used in evidence in said cause on any trial thereof or proceeding therein, subject to the same objections and exceptions as if said witness were personally present on the stand, but without objection or exception to the time, place, or manner of taking the same, or the form of the question, unless noted at the time. That said testimony may be taken pursuant to the provisions of Section of the Code of Civil Procedure of the State of California.

Dated this 21st day of June, 1946.

STEPHEN MONTELEONE,
Attorney for Plaintiff.

JOHN E. McCALL,
Attorney for Defendant Glens
Falls Indemnity Company.

Plaintiff's Exhibit No. 21—(Continued)

In the District Court of the United States for the
Southern District of California, Central Division

No. 5021-PH

BASICH BROTHERS CONSTRUCTION COM-
PANY, a Corporation,

Plaintiff,

vs.

GLENS FALLS INDEMNITY COMPANY, a
Corporation, and ANDREW DUQUE and
CARSON FRAZZINI, Co-partners, doing
business under the name of DUQUE &
FRAZZINI,

Defendants.

DEPOSITION OF NICK L. BASICH

called as a witness on behalf of Defendant Glens Falls Indemnity Company, on Friday, June 21, 1946, at the hour of 2:00 o'clock p.m. of said day, in Suite 1050, Petroleum Building, 714 West Olympic Boulevard, Los Angeles, California, pursuant to Stipulation hereto annexed, before C. W. McClain, a Notary Public in and for the County of Los Angeles, State of California.

Appearances:

Stephen Monteleone, Esq., for the plaintiff.

John E. McCall, Esq., for Defendant Glens Falls Indemnity Company.

Plaintiff's Exhibit No. 21—(Continued)

NICK L. BASICH

called as a witness on behalf of Defendant Glens Falls Indemnity Company, being first duly sworn, testified as follows:

Direct Examination

By Mr. McCall:

Q. Mr. Basich, state your full name and address.

A. Nick L. Basich, 3490 San Pasqual Street, Pasadena.

Q. Have you ever given a deposition before?

A. Yes.

Mr. Monteleone: I have advised the witness of the nature of the deposition, Mr. McCall, and he has full knowledge of the purpose of it, and I think you can dispense with that part of it.

Mr. McCall: Thank you, Mr. Monteleone.

Q. (By Mr. McCall): Is the firm, Basich Brothers Construction Company, a corporation?

A. Yes.

Q. What position do you hold in the firm?

A. Right now, President.

Q. Were you President on or about January and February of 1945? A. No.

Q. Who was President at that time?

A. R. L. Basich.

Q. When did you become President of the firm?

A. In March, 1945.

Q. Who is R. L. Basich—a brother of yours?

A. A brother.

Q. Where is he located?

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

A. I don't know the exact address. 1670 Oak Knoll Avenue, San Marino. I think that is the right number.

Q. Where is his office?

A. 600 South Fremont Avenue, Alhambra.

Q. Is he an officer of the Basich Brothers Construction Company now? A. Yes.

Q. What office does he hold now?

A. Treasurer and Vice President, both.

Q. What position did you hold with Basich Brothers Construction Company, a corporation, in February, the early part of February, 1945?

A. I was Treasurer and Vice President, both.

Q. You kind of switched jobs with your brother; is that right?

A. Well, there is more vice presidents than one.

Q. Then he is Vice President——

The Witness: Pardon me. This is not on the record now.

(There was a discussion off the record.)

Q. Then, Mr. Basich, what were your duties with reference to the construction work you carried on in February, 1945? A. General Manager.

Q. And as President since then, you are still the General Manager? A. Yes.

Q. On or about the 25th day of January, 1945, did you enter into a contract with the United States Government for the performance of some construction work at Davis-Monthan Field, near Tucson, Arizona? A. Yes.

Plaintiff's Exhibit No. 21—(Continued)

(Deposition of Nick L. Basich.)

Q. Will you state the nature of the work covered by the contract?

Mr. Monteleone: Just a minute. I object to the question and instruct the witness not to answer. The contract speaks for itself, Mr. McCall, unless you want to know the general nature of the work.

Mr. McCall: All right. He can state the general nature of the work, if he wishes.

Mr. Monteleone: The contract is a very elaborate proposition, and covers various phases that the witness may not recall now, or be able to indicate correctly, and for that reason I will not permit the witness to answer the question, unless you want a general answer.

Mr. McCall: This is off the record here.

(There was a discussion off the record.)

Q. (By Mr. McCall): What I want you to give is the general nature of the work covered by the contract.

A. The nature of the work covered by our contract was the extension of a taxiway, runways, parking aprons, storm drains, drainage ditches, and small structures for drainage.

Q. Did Basich Brothers Construction Company sub-let a portion of the work you have mentioned to Duque & Frazzini, defendants in this action?

Mr. Monteleone: Wait a minute. I am going to object to the question as calling for a conclusion on the part of the witness, and instruct the witness

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

not to answer that question. If you ask him whether or not they entered into a contract with Duque & Frazzini in connection with certain materials to be used on that job, I have no objection. We are getting into a legal proposition, Mr. McCall.

Mr. McCall: Mr. Monteleone, the instrument that I referred to is called, in the body of the instrument, a subcontract, between Basich Brothers Construction Company and Duque & Frazzini. Do you object to that?

Mr. Monteleone: I will stipulate, for the purpose of the deposition, that Basich Brothers Construction Company entered into a contract with Duque & Frazzini, which is designated on the top of the contract as a "subcontract."

Mr. McCall: What is the date of that contract?

Mr. Monteleone: February 7th—

The Witness: I don't know the date of it off-hand.

Mr. Monteleone: It was February 7th—

The Witness: 1945.

Mr. Monteleone: 1945—that is right.

The Witness: You have got the date there, anyway.

Mr. Goodman: February 7, 1945.

Q. (By Mr. McCall): Is that your answer, Mr. Basich, February 7, 1945?

A. Well, whatever is in the contract.

Mr. Monteleone: I will stipulate that that is it.

Plaintiff's Exhibit No. 21—(Continued)

(Deposition of Nick L. Basich.)

Q. (By Mr. McCall): Then what was the nature of the work to be performed under the terms of the subcontract?

Mr. Monteleone: I object to that as calling for a conclusion of the witness. The contract speaks for itself and is the best evidence, unless you want a general answer, without going into any of the legal phases of the contract itself.

Mr. McCall: It is all right with me, just whatever answer you want to give, Mr. Monteleone. You may so instruct him, as to how far he can go in his answer.

Mr. Monteleone: I have made my objection.

A. We had a job there that required rock and sand, for the work, and that portion of the material was subbed to Duque & Frazzini.

Q. What is meant by the word "aggregate" used in the subcontract?

A. "Aggregate" means the stone and sand. That is the meaning of it. It could be gravel, wash gravel, out of the river, round, and it could be crushed. It could be any way, but it consists of rock and sand.

Q. As I understand it then, the aggregate consists of rock or gravel or sand or cement?

A. No. The cement isn't there, not as far as I know. Of course, I am no authority on it.

Q. Who prepared the subcontract between Basich Brothers Construction Company and Duque & Frazzini, if you know?

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

Mr. Monteleone: You refer to the document designated as a "subcontract," Mr. McCall?

Mr. McCall: That is right, yes.

A. I don't know who did it. I think George Popovich or you (indicating Mr. Monteleone) did it.

Q. (By Mr. McCall): When and where did you sign it?

A. I believe it was in our office. I have no recollection of when I signed it, but I am satisfied it was in our office, because I was in our office at that time.

Q. Where is your office located?

A. 600 South Fremont, Alhambra.

Q. When and where did Duque or Frazzini sign it?

A. I don't know.

Q. Will you give a description, then, as to where the contract work of Duque & Frazzini was to be performed?

A. I didn't hear that.

Mr. McCall: Will you read it, please?

(The question was read by the reporter.)

A. In what location?

Q. That is right. A. What place?

Q. Yes.

A. At the property of Mr. Golub, approximately four miles from the air base.

Q. What direction from the air base?

A. I couldn't tell you that.

Plaintiff's Exhibit No. 21—(Continued)

(Deposition of Nick L. Basich.)

Q. And that was in Arizona? A. Yes.

Q. Near Tucson?

A. Eight miles from Tucson.

Mr. McCall: This is off the record.

(There was a discussion off the record.)

Q. Do you know personally whether Duque & Frazzini performed all the terms of their subcontract?

Mr. Monteleone: Just a minute. I object to the question as calling for a conclusion on the part of the witness, and I instruct the witness not to answer that question. You can refuse to answer that, Mr. Basich, under my instructions. That is for the Court to determine. Just refuse to answer it.

Mr. McCall: Then you refuse to let the witness give any answer on that?

Mr. Monteleone: I do, on that question, Mr. McCall. If you confine yourself to particulars, I have no objection, but to that general question I do.

Q. (By Mr. McCall): In what particular, if any, did Duque & Frazzini fail to perform the terms of their subcontract?

Mr. Monteleone: Again I am instructing the witness, objecting to the question, on the ground that it calls for a conclusion on the part of the witness, a conclusion of law, and instruct the witness not to answer that question. I have no objection to the witness testifying as to any particulars as to what Duque & Frazzini did or did not do.

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

Mr. McCall: That is all this question asks for.

Mr. Monteleone: All right. But don't ask a question that calls for a conclusion of law.

Mr. McCall: Will you read the question again, Mr. Reporter?

(The last question was read by the reporter.)

Mr. McCall: You are instructing the witness not to answer?

Mr. Monteleone: Not to answer that question?

Mr. McCall: On what ground?

Mr. Monteleone: On the ground that it calls for a conclusion of law.

Mr. McCall: I wasn't asking for the law. I was asking for facts.

Q. (By Mr. McCall): In what particular, if any?

Mr. Monteleone: I am still going to stand on that instruction. I have no objection to the witness testifying to what Duque & Frazzini did or did not do in connection with the prosecution of the work.

Q. (By Mr. McCall): How many superintendents did Basich Brothers Construction Company have on the prime contract job, if any?

A. One general superintendent.

Q. What was his name?

A. George Kovick.

Q. And, as general superintendent, what was his duty on the job?

A. Like all other general superintendents.

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

Q. In charge of the entire project?

A. In charge of the entire project.

Q. How many foreman, if any, did Basich Brothers Construction Company have on the prime contract job?

A. They had plenty of them. I don't know off-hand.

Q. Could you give the names of any of them?

A. Really, I don't know, except they were practically all new ones, except a few old ones that I had. If you want to know a couple of names that I know—

Q. Just give the names of those you know.

A. One of them is Jim Kucinar. Another one is John Hasich.

Q. Now, did Duque & Frazzini use only their own machinery and equipment on the job, or did they use also some of your machinery and equipment?

A. Yes; they used our crushing plant, and odds and ends, off and on, but steadily they used the plant.

Q. And the rock plant belonged to you?

A. Yes. Pardon me. This is off the record.

(There was a discussion off the record.)

Mr. Monteleone: I want that on the record.

Q. (By Mr. McCall): Will you go back and give use just exactly what equipment and machinery of yours they used.

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

A. You have got everything on the records there some place, but I know they used the plant all the way through. They wasn't able to rent certain pieces of equipment from anybody, so we have got to go out and rent it from somebody else and re-rent it to them at the same prices. We did that, and some we rented to them from day to day, some by a weekly basis, some by a monthly basis, and some by an hourly basis.

Mr. Monteleone: Mr. McCall, we have prepared a bill of particulars, I think, for these various items, which you will have.

Mr. McCall: And that will correspond with this. It may be a little over-reaching, but it won't hurt anything.

The Witness: I can't tell exactly, but the books have got everything.

Mr. McCall: I am sure that your attorney, Mr. Monteleone, has explained to you that, after this deposition is taken down in shorthand and then transcribed, you will have an opportunity to read it over and make any corrections you want to make.

Mr. Monteleone: He understands that.

The Witness: I understand that.

Mr. McCall: That is, corrections to the answers, but not as to the questions.

Mr. Monteleone: Yes. This is off the record.

(There was a discussion off the record.)

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

Q. (By Mr. McCall): I believe you said Duque & Frazzini used a rock crushing plant belong to you?

A. Yes.

Q. Did they use that from the beginning of the job, or did it come on after the beginning?

A. To my recollection, it was around the first they started to use it, around the first of April, in that neighborhood somewhere.

Q. What was the name of that plant that you refer to?

A. Pioneer, Pioneer V-48.

Q. On what date did Duque & Frazzini begin work on the subcontract in question?

A. I don't recollect that date.

Q. When did you personally first go on the job at Davis-Monthan Field?

A. Which way do you mean?

Q. After you took over the job and started construction, when did you go on the job at Davis-Monthan Field?

A. I was on the job—I figured the job, and I was on the job right after I did it, and I was on the job off and on all the time, but what dates I don't know; I can't state those dates.

Q. You were on the job from the beginning to the end, every day or so, or every few days; is that right?

A. Off and on.

Q. But you do not know of your own knowledge the date that Duque & Frazzini started on this aggregate or subcontract work?

Plaintiff's Exhibit No. 21—(Continued)

(Deposition of Nick L. Basich.)

A. No, I don't, right now, but it is in the records.

Q. Do you have the records with you?

A. No.

Q. I take it you were not present at the site you have mentioned, some four miles from the main job, when Duque & Frazzini started work?

A. I was on the job when Duque & Frazzini started moving in, if that is what you want.

Q. What time was that, when they started moving in?

A. I don't know the date—some time in February.

Q. Were you out at the site you have described above? A. Yes.

Q. What machinery did they have moved on to the job when you were there?

A. A part of the plant.

Q. Was that before February 19, 1945?

A. I believe so.

Q. And then did your plant reach the site of the subcontract work, where the work was to be done by Duque & Frazzini, prior to February 19, 1945?

A. Our plant?

Q. Yes.

A. I don't recollect what day, but it was moved out there sometime at that time.

Q. Then you would say that your Pioneer plant was moved on to the site where the gravel and aggregates was to be produced some time the latter part of February, 1945; is that right?

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

A. I believe it would be between the 15th and 25th.

Q. Did Mr. George Kovick, your general superintendent, have charge of constructing this Pioneer plant?

The Witness: This is off the record.

(There was discussion off the record.)

Q. (By Mr. McCall): I will ask you to explain, for the record, who constructed, on the subcontract site, the Pioneer rock crushing plant that you have mentioned?

A. We did, by order of Duque & Frazzini. They can't get the men, so they used our men.

Q. And that was under your supervision, or whose supervision?

A. Duque & Frazzini, and also the superintendent, to see that they set up the plant right, that they won't wreck the plant, or something like that.

Q. What was his name?

A. George Kovich.

Q. Then what time did this Pioneer plant start operating?

A. Oh, in the neighborhood of April first.

Q. Did Duque & Frazzini have any other plant operating in the production of material before the Pioneer plant started? A. Two.

Q. They had two plants before that?

A. Yes.

Q. When did Duque & Frazzini start operating the first plant to produce material?

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

A. Some time in February—I think between the 20th and 25th, one of those dates.

Q. How many plants did they start operating in February? A. Just one.

Q. Do you know how much material and what kind of material that plant produced in February?

A. That plant was set up for the crusher run base. That means all material combined together, such as sand, dirt and gravel, crushed.

Q. And you say that first plant of Duque & Frazzini's started operating the latter part of February?

A. Between the 20th and 25th.

Q. Then when did they put in the second plant, if ever?

A. I don't know when they completed it or the day they started, but they started some time in February, and I think the first production of that plant they put in, the second plant, was sometime between the 25th of March and the 1st of April.

Q. What were those dates—the beginning of the second plant installed by Duque & Frazzini?

A. They started some time in February, I believe.

Q. That is, as I understand it, then, the first plant that was installed by Duque & Frazzini started operating between the 20th of February and the 1st of March?

A. Yes, between that time.

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

Q. And the second plant that they installed started operating between what dates?

A. The 25th of March and the 1st of April.

Q. Between the 25th of March and the 1st of April? A. Yes.

Q. And the Pioneer plant which was constructed started operating about April 1, 1945?

A. Between the 1st and 3rd or 4th, something like that. I don't know the date exactly.

Q. But it was within——

A. But it was within five days there.

Q. Who owned the first plant they started operating at the job? A. I don't know.

Q. What was that plant called?

A. I think it was a home-made affair. I don't know if there was any name to it.

Q. What kind of aggregate, if any, did it produce? A. A crush run base.

Q. Rock-crush? A. Yes.

Q. What kind of aggregate did the second plant produce?

A. It was supposed to produce gravel for concrete paving, supposed to produce material for that.

Q. And the third plant, that was owned by you, the Pioneer—that made three plants, didn't it?

A. Yes: and they have got one more besides that.

Q. Which made a total of four plants on the job?

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

A. Sometimes four plants in there.

Q. Then the third plant that belong to you was 4/1/45, or thereabouts?

A. Something like that.

Q. When was the fourth plant installed?

A. In that neighborhood, from March 15th to April 1st.

Q. What did it produce? A. Sand.

Q. Rock? A. Sand.

Q. Sand? A. Yes.

Q. Did the first plant that was installed produce anything except rock at any time? A. No.

Q. That is all it produced?

A. That is all it produced.

Q. Was rock the only thing they produced for you prior to the 25th day of March, 1945?

A. That is all they produced.

Q. Did they produce any sand in that time?

A. The sand plant was set up in March—I don't know what date, but between the 20th and the first of April, anyway—and they produced some sand out there. I don't know what date. Of course, it wasn't any of our business to say when they produced it, and they could do it as they wanted to.

Q. How many times, if any, were you out on the job of Duque & Frazzini between the 20th day of February, 1945, and the 25th day of March, 1945?

A. I don't know, but any time I was over there I was every day in that pit. And Duque wasn't

Plaintiff's Exhibit No. 21—(Continued)

(Deposition of Nick L. Basich.)

there the first time, but Frazzini was there all the time; every time I was there Frazzini was there, but Duque wasn't there for quite a few days—I didn't see him on the job.

Q. What was the first time you were there—when in February, 1945?

A. Like I told you, the day they moved the stuff in, the first part of the plant. I don't know what date.

Q. It was around the 20th of February, was it?

A. Before that.

Q. Were you there on the 19th and 20th of February? A. I don't know.

Q. You don't know, then, whether they started operating this plant on February 19th or not?

A. I don't know, but I think we have got records of it.

Q. From whom did you get those records?

A. At the time we took the material.

Mr. McCall: The witness didn't understand the question. Will you read the question to him?

Mr. Monteleone: I think he did. Their records will show when they first started to haul material from the plant.

Mr. McCall: My question was, from whom did he get the records?

The Witness: From our own records.

Q. (By Mr. McCall): What officer or employee of your corporation made up the records?

Plaintiff's Exhibit No. 21.—(Continued)
(Deposition of Nick L. Basich.)

A. Naturally, when I go out there, the first load we took out of the Duque & Frazzini plant, that is in our records.

Q. Do you know what date that was?

A. No, I don't know when.

Q. Do you have the records here?

A. I think the records are some place.

Q. Did your general superintendent make you a daily record of the operations of Duque & Frazzini and send it to your Alhambra office?

A. No.

Q. Now, state, if you can, Mr. Basich, the date that Duque & Frazzini did the last work on the subcontract.

A. Oh, I believe they pulled off the job——

Mr. Monteleone: Mr. McCall, when you referred to the subcontract, you referred to the instrument designated as "Subcontract"; is that right?

Mr. McCall: That is right. I am just going by the instrument. It will be stipulated that when I refer to the subcontract of Duque & Frazzini I am referring to the instrument which purports to have been executed between Basich Brothers Construction Company and Duque & Frazzini on the 7th day of February, 1945, and which bears on its face the word "subcontract", and to which the attorney for the plaintiff objects on the ground that he claims that it is not a subcontract.

Mr. Monteleone: Wait a minute. You are wrong there. I do not claim or disclaim that it is a sub-

Plaintiff's Exhibit No. 21—(Continued)

(Deposition of Nick L. Basich.)

contract. I merely take the position that whether it is or is not is a legal proposition for the court's interpretation, and not for you or me to interpret, and I don't want this witness on record as giving his own conclusion of law as to whether it is a sub-contract or not.

Mr. McCall: Outside of that, you do not object to my referring to it by the name that it bears?

Mr. Monteleone: That is right.

Mr. McCall: Now would you refer back to the question, Mr. McClain, which was, "When did Duque & Frazzini do the last work on the sub-contract"? Will you read that back to the witness?

(The last question was read by the reporter.)

A. As far as I remember it was in the first part, the first week in June, they pulled off the job and refused to proceed with the work.

Q. (By Mr. McCall): As I understand it, Mr. Basich, you are not able to state definitely the first day that Duque & Frazzini produced some material on the job?

A. Definitely, that is correct.

Q. But they did produce, with one plant, some material on the job, the last week in February?

A. I believe between the 20th and the 25th.

Q. Between the 20th and 25th?

A. Of February, yes.

Q. Then did Duque & Frazzini work continuously on the job from the time they started, on the

Plaintiff's Exhibit No. 21—(Continued)

(Deposition of Nick L. Basich.)

20th or 25th of February, 1945, until the first week in June, when you state they pulled off the job?

A. They were on the job continuously. I don't know that both of them were on the job, but Duque & Frazzini were represented there.

Q. Who completed the work referred to as the "subcontract"?

Mr. Monteleone: You mean who did the physical completion of it?

Mr. McCall: No. I imagine laborers did the physical completing of the job.

Mr. Monteleone: It is our contention that the work was completed for the benefit of your company and Duque & Frazzini, and the physical part of it was done by the Basich Brothers firm.

Q. (By Mr. McCall): Is that your answer?

A. That is right.

Q. That it was done by Basich Brothers?

A. That is right.

Q. Did Basich Brothers complete the work by its own force, or sub-let the work to some other contractor?

A. We completed the work with our own force, by hiring this equipment, and paid for the same, and hiring the men and paying them, and all the other work, with the exception of one crushing plant that we leased at so much a cubic yard, truck measure.

Q. And who did that one plant belong to?

A. PDOC, of Tucson, Arizona.

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

Q. Then did Duque & Frazzini, while they were on the job with the plant you have mentioned, produce 1600 cubic yards of material per day?

A. They were capable.

Q. Then when did they first produce 1600 cubic yards of material per day? A. I don't know.

Q. Your records would show?

A. They will show whatever we took. But I want you to understand, Mr. McCall, all the concrete material, aggregate, produced by Duque & Frazzini, that was delivered to the stock pile by them, and therefore we didn't know how many yards they put in there. On a crusher-run base, they produced it, and we were supposed to take whatever we could use in connection with our job, and the rest of it was supposed to be stock-piled. So they were stock piling, and we took the material at the same time. Therefore I can't tell you correctly how much they produced.

Mr. McCall: Will you read that last part back to him?

(The last answer was read by the reporter.)

A. (Continuing): That is on the one plant; that is on the crusher run plant. That is the first one they sent in.

Q. The first one they sent in?

A. Yes; that is right.

Q. Do you know the total amount of material produced for you by Duque & Frazzini while they were on the job? A. I don't know offhand.

Plaintiff's Exhibit No. 21—(Continued)

(Deposition of Nick L. Basich.)

Q. Do you have a record that would show that?

A. Yes.

Q. Then you do not have that record with you?

A. Not with me, no.

Mr. Monteleone: Off the record.

(There was a discussion off the record.)

Q. (By Mr. McCall): Approximately how many men did Duque & Frazzini work?

A. I don't know.

Q. Did Duque & Frazzini have a superintendent on that job?

A. I don't know. They have got somebody in charge.

Q. Did they have a man by the name of Albino?

A. Yes.

Q. Is he working for you now? A. No.

Q. Prior to the time he went on the Duque & Frazzini job he was with you, was he not?

A. Off and on.

Q. Off and on? A. Yes.

Q. Who paid the wages or salaries for the employes of Duque & Frazzini?

Mr. Monteleone: You mean who handed the physical money to them; is that correct?

The Witness: I didn't get that.

Mr. McCall: Will you read it to him, Mr. Reporter?

(The last question was read by the reporter.)

A. We did, on their request, on Duque & Frazzini's request, as provided in the contract.

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

Q. (By Mr. McCall): Compensation was carried on the subcontract job, was it not?

A. We charged them for the compensation, and the men were covered under our compensation.

Q. Under your compensation? A. Yes.

Q. Then in the insurance policy of compensation, instead of Duque & Frazzini being named as the employer, Basich Brothers Construction Company was named as employer; is that right?

Mr. Monteleone: You mean in the policy itself?

Mr. McCall: Yes.

Mr. Monteleone: That is, if you know, Mr. Basich, how the policy reads.

A. I don't know how the policy reads, but I know this much, that whatever is covered in our payroll is covered with our insurance, and we agreed to advance the money and pay the men, so it is in our payroll, and charge the same to Duque & Frazzini, according to the contract.

Q. All the employes, then, of Duque & Frazzini were on your payroll? A. I think so.

Q. And on your insurance roll all the time?

A. Yes.

Mr. Monteleone: Now, whether it was or not——

The Witness: I don't know that.

Mr. Monteleone: Don't answer that.

The Witness: You know that, but I don't know.

Q. (By Mr. McCall): Do you know who is named as the employer in the public liability and property damage insurance policy?

A. No, I don't, offhand.

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

Q. Did the State of Arizona carry the compensation policy? A. The State of Arizona?

Q. The State Fund? A. Yes.

Q. Who carried the liability insurance on the subcontract job, for property damage?

A. I don't know that. I don't think we did.

Mr. McCall: Off the record.

(There was a discussion off the record.)

Q. (By Mr. McCall): Did Basich Brothers Construction Company deduct the 20 per cent withholding tax and send it to the Government?

A. On the labor?

Q. On the labor.

A. On the payroll?

Q. On all the employees.

A. On the payroll.

Q. Of Duque & Frazzini?

A. Yes, we did.

Mr. Monteleone: That is, it was a matter of bookkeeping, wasn't it?

A. It was just a matter of bookkeeping, and a matter of law, that you have to take it off, as long as you have got it on your payroll.

Q. (By Mr. McCall): Then in the income withholding tax return which was filed with the Federal Government covering the employees on the subcontract work, Basich Brothers Construction Company was named as the employer, or were they?

The Witness: Pardon me. Off the record.

Plaintiff's Exhibit No. 21—(Continued)

(Deposition of Nick L. Basich.)

(There was a discussion off the record.)

Mr. McCall: May it be stipulated that you will furnish to me, as attorney for the defendant, the name which is shown on the public liability policy as the employer, and the name which is shown on the compensation policy which was carried as the employer for the men of Duque & Frazzini, and the name shown as employer on the income withholding tax return filed with the Federal Government on all the subcontract work referred to in the subcontract of February 7th?

Mr. Monteleone: Oh, yes, I will give you that information.

The Witness: And old age and Social Security too.

Q. (By Mr. McCall): Did Basich Brothers Construction Company keep a daily record of the material furnished by Duque & Frazzini while they were on the job?

A. On that answer, I can tell you what they tell us they produced. Yes, we have those records.

Mr. McCall: Will you read that back to me? I didn't quite understand the answer.

(The answer was read by the reporter.)

Q. (By Mr. McCall): The only records that you have are the records given you by Duque & Frazzini?

A. Of daily production, yes.

Q. On daily production?

A. Yes.

Plaintiff's Exhibit No. 21—(Continued)

(Deposition of Nick L. Basich.)

Q. Didn't this Mr. George Kovick keep a daily record of production?

A. No. But we kept what Duque & Frazzini tell us they produced, but we keep a record of what we took.

Q. All the material which you got from Duque & Frazzini was hauled by your trucks, was it not?

A. From the location of the plant to the job, yes.

Q. And you kept daily records of all the trucks which hauled the material from the subcontract job, four miles from your job at Davis-Monthan Field; is that right?

A. Whatever we took from the plant, we kept a record of that.

Q. Did you keep the record by yards or by truck loads?

A. The concrete material, we kept how many yards of concrete we poured, and those have been weighed on the scales to our batching plant.

Q. That is, all the material and aggregate produced by Duque & Frazzini under the subcontract was weighed at the batching plant before it went into the concrete; is that right?

A. The concrete material, yes.

Q. Yes.

A. The concrete material only.

Q. What do you refer to as concrete material?

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

A. What went into concrete, the ones incorporated in concrete, rock and sand.

Q. Produced by Duque & Frazzini?

A. That is right.

Q. What other material did they produce?

A. Crusher run.

Q. What was that used for?

A. For base.

Q. That was the concrete base?

A. Under the concrete.

Q. Did you use any other material?

A. They produced a plant mix material for black stuff.

Q. What is plant mix material?

A. That consists of sand, rock and muck sand.

Q. And that is all mixed together and put over what?

A. Well, I don't know—it was put on top of the crusher run.

Q. And the concrete run then was put on top of that? A. No.

Q. What was put on top of that?

A. Nothing.

Q. That was the apron?

A. No. That was the outside of the concrete apron, the concrete aprons and roadways and taxi ways; that was put on the outside edge, and that was weighed by the ton.

Q. You paid Duque & Frazzini by the ton on that? A. That is right.

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

Q. As I understand it, then, your men kept a daily record of all the truck loads hauled from the subcontract job to your job; is that right?

A. On crusher run, yes.

Q. Which one of your men kept that record—Kovick? A. What do you mean?

Q. The record of all of the truck loads of material you just mentioned?

A. Well, someone kept a record, but not Kovick, but they were given to Kovick every night.

Q. Do you know if the record was given to him by Albino?

A. No. Albino had nothing to do with this.

Q. Anyway, the material was not paid for until it went in place on the job?

A. That is right, and we didn't accept the material until we took it, therefore Albino wasn't a part of that at all.

Q. Then the record was turned in by someone to George Kovick?

A. By the timekeeper or bookkeeper or someone—I don't know.

Q. And George Kokick turned it in to your company?

A. On concrete paving, we have got two records on that.

Q. What records are those?

A. We have got the records of the batching plant, how many batches and how heavy those batches were, and the weight of the batch, every

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

batch, and then we have got records on the mixer that registers every batch on the automatic register. We always keep the register.

Q. Then these reports that you have just mentioned were sent daily to your head office in Alhambra? A. Not daily.

Q. How often were they sent?

A. We kept a monthly record up there all the time.

Q. Did Basich Brothers Construction Company own the land from which Duque & Frazzini got the material? A. No.

Q. Did Basich Brothers Construction Company lease that land from someone else?

A. I myself made a deal before I put in the bid on the job, on a royalty basis.

Q. Was George Kovich on the job as superintendent for you all through February and March and April of 1945?

A. What day George Kovick started work I don't know. It was some time in February, I believe, or it must have been February and he stayed on the job until the job was finished.

Q. Do you know where he is located now?

A. In Fresno, California.

Q. I believe you said that the only material produced in February by Duque & Frazzini was rock from the first plant that they installed; is that right?

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

A. Crusher run from the first plant they installed.

Q. Well, how much material in February and March did they produce per day, if you know?

A. I don't know.

Q. When did you first learn, if you ever did, that they were not producing 800 yards per day per plant of suitable material?

Mr. Monteleone: This is off the record.

(There was a discussion off the record.)

Q. (By Mr. McCall): When did you first discuss with Duque & Frazzini, if at all, the question of their producing enough suitable material?

A. When did I first discuss it with them?

Q. Yes, if you ever did discuss it with them.

A. I discussed it with them some time in March.

Q. What time in March was that?

A. I don't know the date. I couldn't say it.

Q. Where did this discussion take place?

A. At the job.

Q. Out at the job? A. Yes.

Q. Who was present at that time?

A. I wouldn't say who was present. I am satisfied that Kovick was and Frazzini.

Q. What was said by you to Frazzini at that time?

A. I asked him how he figured to produce the material, and he told me all about it, how to do it; and I asked him, I said, "Frazzini, you had better

Plaintiff's Exhibit No. 21—(Continued)

(Deposition of Nick L. Basich.)

stock pile some material." Well, he don't like stock pile, because it costs them money to stock pile. And that is all I can say to him, because I can't tell him what to do. I thought he was going to put on two shifts when the time comes.

Q. Did you tell him so?

A. No, I never told him to put on two shifts.

Q. Approximately what time in March was this talk with Frazzini?

A. I don't know. It must be the first part of March, I believe, or somewhere around the last of February or the first of March.

Q. The last of February or the first week in March?

A. Some time in there.

Q. Up to that time he hadn't produced any?

A. Yes; he had produced what we could use, plenty for us to use.

Q. Plenty of what? A. Crusher run.

Q. But nothing else?

A. We didn't need it.

Q. You say he had produced plenty up to that time for you to use. What was the occasion of your complaint to him at that time?

A. I didn't complain. I just asked him how did he figure to produce material, and how fast, and everything else.

Q. But up until that time he had produced all the material you needed? A. Yes.

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

Q. And the only thing you had needed was some rock?

A. Crushing rock, yes, gravel base.

Q. How much, then, had you needed?

A. I don't know, but he produced all we needed. I don't know how much.

Q. Do you know whether or not it had reached 800 cubic yards per day? A. I don't know.

Q. You don't know that? A. No.

Q. When was the next time you discussed with either Duque or Frazzini the question of them furnishing you adequate material?

A. I think it was the last part of March.

Q. Where did that discussion take place?

A. At the place there.

Q. With Frazzini again?

A. With Frazzini again.

Q. Was George Kovick with you again?

A. Yes.

Q. Was that the first time you had been back on the job since this first discussion you just referred to? A. I don't know.

Q. You might have been back on the job between those times?

A. I might. Of course, my diary would show, but I haven't got it with me.

Q. Was anyone present besides you and Frazzini that time? A. I think Duque was, that time.

Q. What was said then about them producing material?

Plaintiff's Exhibit No. 21—(Continued)

(Deposition of Nick L. Basich.)

A. I said to them, I asked them to produce material for concrete, and when was it going to be ready, because we were ready to start.

Q. Had they produced any material for concrete up to that time? A. No.

Q. Did they tell you why they had not produced material for concrete up to that time?

A. They told me it cost too much to stock pile a big pile, and they didn't have a plant to set up. I suppose. I don't know what it was. I didn't ask them, because it was none of my business.

Q. When was the next time you discussed with Duque & Frazzini the question of furnishing material under the subcontract?

A. At that time, when I was asking them how they figured to produce material, the answer that they gave me, to my estimation, wasn't satisfactory.

Q. What was the answer?

A. They said they were going to run one shift, and they were going to produce so much, and, to my estimation, they wasn't able to.

Q. What time was this?

A. The last part of March.

Q. That was the last talk you had with them?

A. Yes—or the first part of April.

Q. What did you say to them at that time?

A. I didn't say nothing to them. I got Mr. Monteleone or someone to get in touch with Mr. Bray.

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

Q. Where did you say you signed this subcontract with Duque & Frazzini?

A. Some time in February.

Q. And where was that?

A. I believe in our office.

Q. Was there attached to that subcontract at that time a copy of your contract with the War Department?

A. I don't know, but we had the contract in the office.

Q. Did Basich Brothers Construction Company ever give to Duque & Frazzini a copy of its contract with the War Department on this Davis-Monthan Field?

A. You mean our contract?

Q. Yes. A. They had access to it.

Q. Did you ever give them a copy?

A. I don't know.

Q. Do you know how much material was produced by the first plant that was moved on the job up until, say, the 15th of March, 1945?

A. I don't know.

Q. Mr. Basich, I will show you what purports to be a copy of a letter of June 8, 1945, dated at Tucson, Arizona, addressed to Basich Brothers Construction Company at Tucson, from Duque & Frazzini, which reads in part: "You have now moved into the gravel pit near where we are working and have started to produce and are producing the materials which we are required to produce and

Plaintiff's Exhibit No. 21—(Continued)

(Deposition of Nick L. Basich.)

furnish under our contract with you." Do you know if you received that letter?

A. I suppose we did, but I am not so sure it is word for word, but we did receive a letter.

Q. This letter of June 8, 1945, further states: "We are suspending our operations until you cease producing the material which we are required to produce under our contract, and unless you do immediately cease and remove the new equipment we will remove our equipment from the job and treat this as a breach of and a termination of the contract." Did you receive such a letter from Duque & Frazzini?

A. I don't know the contents of it, but we got a letter from them.

Mr. McCall: I will ask, Mr. Monteleone, if it may be stipulated that this is a copy of the original letter?

Mr. Monteleone: If you say it is. I have a copy of a similar letter, so I assume it is a copy of the original.

Mr. McCall: Will you produce the original at the pre-trial?

Mr. Monteleone: Yes, we will produce it. If not, you may be permitted to use the copy.

Mr. McCall: Thank you.

Q. (By Mr. McCall): After the receipt of this letter of June 8, 1945, from Duque & Frazzini, did

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

Basich Brothers stop producing material at the subcontract site?

A. No. They didn't stop.

Q. How long at that time had you been producing material with your own plant and men, as distinguished from the operations under Duque & Frazzini? A. A day or so.

Q. A day or so? A. Yes.

Q. Did Duque & Frazzini leave the job?

A. They did.

Q. What date was that?

A. They stopped operations on the 8th or 7th, one or the other.

Mr. Monteleone: Two days previously, about the 6th.

The Witness: I think it was the day before this letter was written.

Q. (By Mr. McCall): Then did Basich Brothers continue the job from June 8th on until it was complete?

A. For the benefit of Glens Falls, yes.

Mr. McCall: I move that that be stricken as not responsive, "For the benefit of Glens Falls."

Mr. Monteleone: In other words, you are trying to minimize the loss of your insurance company.

Q. (By Mr. McCall): Then your answer is that Basich Brothers did continue with the work after Duque & Frazzini, you say, pulled off the job, until the work was completed; is that right?

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

A. I think, to answer that, we did continue the work, but wrote a letter to Glens Falls giving them so many days to arrange this, to take up on their bond, take up the contract to finish it, or let us finish it.

Mr. McCall: I move that the answer be stricken as not responsive to the question and as self serving.

Q. (By Mr. McCall): I will ask you, Mr. Basich, if you continued the work of producing material which is mentioned in this subcontract with Duque & Frazzini with the same machinery that Duque & Frazzini was using? A. No.

Q. What?

A. Not all of it—a portion, yes.

Q. What machinery did you continue to use with Duque & Frazzini was using?

A. Duque & Frazzini removed all of their equipment except one electric motor.

Q. What machinery was left, then, when they removed all their equipment?

A. They removed all their equipment.

Q. All the equipment that was left belonged to you, did it not? A. No.

Q. Who did it belong to?

A. One plant belonged to PDOC, and one shovel belonged to Tempe-Stone, and there was a lot of other small equipment from different people.

Q. At the time they pulled off the job, then,

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

they did not own a plant of any kind, did they?

A. They moved theirs.

Q. Did you keep the same employes they were using? A. Anyone that wanted to work.

Q. Did Mr. Albino stay on the job?

A. Yes.

Q. Until it was completed?

A. That is right. Well, I don't think it was complete. I think he got hurt before the completion of the job.

Q. He got hurt before? A. I think so.

Q. And he went on compensation then?

A. Yes, and he is still on compensation, I believe.

Mr. McCall: This is off the record.

(There was a discussion off the record.)

Q. (By Mr. McCall): Then he was injured before the job was completed?

A. I think he was, yes. What day, I don't know.

Mr. McCall: This is off the record.

(There was a discussion off the record.)

Q. (By Mr. McCall): I will show you what purports to be a letter addressed by Basich Brothers Construction Company, and signed N. L. Basich, dated April 5, 1945, addressed to Duque & Frazzini, Tonopah, Nevada, a copy of which was apparently sent to Glens Falls Indemnity Company at Los Angeles, and ask you if that is your signature? A. That is right.

Plaintiff's Exhibit No. 21—(Continued)

(Deposition of Nick L. Basich.)

Q. In this letter you state to Duque & Frazzini that in their contract dated February 7, 1945, they agreed to commence crushing material with one plant on February 19, 1945, and you state: "Your attention is directed to the fact that the plant did not commence work on February 19th." When you wrote that letter to Duque & Frazzini, did you know of your own knowledge that they did not commence work on February 19th?

A. They didn't start producing February 19th, no.

Q. And you knew that of your own knowledge?

A. Yes, but they started working on the plant before.

Q. But they did not commence crushing on February 19th? A. No.

Q. Do you know what day they did start crushing?

A. Between the 20th and the 25th. I said that in the record three times.

Mr. Monteleone: That is February?

A. February, yes.

Q. (By Mr. McCall): Now, you state in this letter that they are using your tools and equipment. What tools and equipment belonging to the Basich Brothers Construction Company were Duque & Frazzini using at that time?

A. Well, I think you have the record to take it from. Of course, I can't tell you just what they used. They got what they asked for.

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

Q. You further state in your letter of April 5th: "To date you have not averaged 800 cubic yards of material per plant per day." When you made that statement, April 5th, was that from your own knowledge of the situation?

A. That is right, from my own knowledge.

Q. You had investigated personally and knew they had not averaged 800 yards of material per day?

Mr. Monteleone: That was on April 5th.

A. That is right.

Q. (By Mr. McCall): Had you investigated to determine if they had at any time produced 800 yards between February 20th and April 5th?

A. No, I didn't.

Q. How did you reach the calculation that they had not averaged 800 yards per day per plant?

A. Well, just common sense. We know what we took and there wasn't much in the stock pile, so there couldn't be that much.

Q. Do you remember how much you had taken at that time?

A. No, I don't remember, but we had records of it.

Q. There is a letter here of May 12th— we have got two of them, and I want you to see both of them at the same time, and I want you to see if there is any objection, and we may ask a question on those.

Mr. Monteleone: This is Kovich's signature. I

Plaintiff's Exhibit No. 21—(Continued)

(Deposition of Nick L. Basich.)

have never seen that before. Have you copies of Kovich's letters?

The Witness: I suppose. That letter is all right.

Mr. Monteleone: We will stipulate that both letters are all right, but I want to have copies as my exhibits.

Mr. McCall: If you do not have copies of these, my office will be glad to make them.

Mr. Monteleone: Would you make me copies, because I want these two letters?

The Witness: You have got them in the file somewhere.

Mr. Monteleone: I want those as exhibits in our case, and I would appreciate it if you would send me copies of them.

Mr. McCall: I certainly will. There are two letters of the same date, from Kovich to Duque & Frazzini, both dated May 12th.

Mr. Monteleone: I am going to make a demand on Mr. McCall to produce them.

Mr. McCall: I would suggest that your office and mine get together and find out what each one has that the other hasn't, and we will each furnish the other with what the other has not got. Would you do that?

Mr. Monteleone: Sure.

Mr. McCall: All right. Suppose we defer that.

Mr. Monteleone: The Judge will want copies of all the exhibits that we have to hand to him. We

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

have to have two copies, as I understand of all exhibits.

Mr. McCall: I believe we have to have about three.

Mr. Monteleone: Why three?

Mr. Burris: Two for the Court and one for the Clerk.

Mr. Monteleone: All right. We have copies.

Mr. McCall: You have copies?

Mr. Monteleone: Yes.

Mr. McCall: That is fine.

Q. (By Mr. McCall): In one of these letters dated May 12th, 1945, address to Duque & Frazzini at Tucson, Arizona, by Basich Brothers Construction Company, by G. W. Kovich, Sup't., it states, in part: "We have received no improvement whatever on your material delivery." Will you please state, Mr. Basich, if you can, what Mr. Kovich meant by the term "material delivery"?

A. I will tell you what the letter meant. Mr. Bray and myself——

Mr. Monteleone: By Mr. Bray you mean the representative of the Glens Falls Indemnity Company?

A. Yes. He came over to Tucson, and we went——

Q. (By Mr. McCall): Was that on May 12th?

A. Before that.

Q. Well, I want to ask you——

A. Well, I am telling you the answer to it.

Q. Go ahead.

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

A. And we spent two days, and Bray was convinced——

Mr. McCall: I object to that as a conclusion.

The Witness: Well, don't put anything down until I——

Mr. Monteleone: Yes, take it down.

Mr. McCall: It is not responsive to the question. There is no use to take it down. Will you read the question that was asked? I am sure the witness does not understand the question.

Mr. Monteleone: I think he does.

The Witness: I understand the question.

Mr. Monteleone: But you don't understand his answer. In other words, Bray and Mr. Basich had discussed with Duque & Frazzini certain improvements to be made, and Duque & Frazzini failed to comply with the suggestions made, and that is the reason this letter was written, because he had not lived up to what he had previously discussed with Mr. Bray.

The Witness: Mr. Bray and myself and Duque & Frazzini and Mr. Kovich and Mr. Earl, of PODC, made a deal for Duque & Frazzini to rent them the same as we operated after Duque & Frazzini left, to be delivered next day on the job and start to erect the plant next day, move it in. And Mr. Bray left that night, and I left that night, and Mr. Frazzini called up George Kovich and he backed out on it, and two or three days after that George Kovich wrote him a letter that he didn't live up to this

(Deposition of Nick L. Basich.)

Plaintiff's Exhibit No. 21—(Continued)

verbal agreement, and I got Mr. Bray and Mr. Earl——

Q. What is the date you are talking about now?

A. I don't know what date we were out there—some time in April, or probably the 1st part of May.

Mr. McCall: I move that all of the answer of the witness be stricken as not responsive to the question, and that the interjections of his counsel, Stephen Monteleone, be stricken, as self serving and irrelevant and immaterial.

Q. (By Mr. McCall): I will ask you, then, Mr. Basich, if Duque & Frazzini delivered material from the subcontract site to the prime contract on the air base? A. No.

Q. Then can you tell us what Mr. G. B. Kovich, superintendent, had reference to when he spoke of material deliveries?

A. Delivery in our trucks.

Q. Then he meant the delivery of material in your trucks on the subcontract job?

A. No—at the plant.

Q. At the plant on the subcontract job?

A. Well, I wouldn't call that a subcontract job.

Q. Well, what was it?

A. Well, it was at the plant.

Q. That was the place you had leased some land

Plaintiff's Exhibit No. 21—(Continued)

(Deposition of Nick L. Basich.)

from the party you mentioned a while ago, for the purpose of producing this material?

A. That is correct.

Q. That is correct.

A. That is where Duque & Frazzini produced their material.

Q. The other letter addressed to Duque & Frazzini by G. B. Kovich, dated May 12, 1945, states, in part: "You lack proper and adequate equipment to operate even on a single shift basis without breakdown." The last paragraph of the letter states: "The above statement regarding lack of proper equipment can be verified from our daily production records of rock base delivered from your plant." Do you know what is meant by the term "daily production records"? In other words, what production was he referring to as "daily production records"?

A. At the time he wrote this letter there probably was no material in the stock pile and he didn't get enough material to keep working on the job.

Mr. McCall: Read the question to the witness again. I don't think he understood it.

The Witness: Yes, I understood it.

Q. (By Mr. McCall): What records did he refer to?

A. Records that we took of material.

Q. Who kept the records?

A. We kept records of what we took.

Q. Was it Kovich that kept the records?

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

A. No. Somebody kept the records, but Kovich was the superintendent, so he didn't keep the records. Although this record that you are talking about on the gravel base nobody is correct on.

Mr. McCall: Will you read that back to me? I don't believe I got it.

(The last answer was read by the reporter.)

The Witness: Couldn't be.

Q. (By Mr. McCall): What do you mean by saying that nobody is correct on the gravel base referred to, or is it referred to in this letter of May 12th?

A. The records they kept or we kept and Duque & Frazzini keep for themselves, they were based on truck measure. Therefore our contract with Duque & Frazzini to furnish us material is based in place, which is different than the shrinkage between truck measure and material in place, and that would run from 15 to 33 per cent. and what this was running, I couldn't tell that, until we got through the job. So we got paid in place from the Government, and then we got the records of the truck measure, which is much better than records in place, and then you have got to reduce that record by a certain percentage, the difference between the two figures.

Q. In other words, as I understand it, the material in place, that is laid in the concrete?

A. No; the concrete is different. That is already understood, so much a yard of concrete, but this

Plaintiff's Exhibit No. 21—(Continued)

(Deposition of Nick L. Basich.)

crusher run, he was stock piling that, and part of it was truck measure, and all measures, as far as the records meant, is the records of truck measure.

Q. Then George Kovich was referring, in his letter of May 12th, to truck measurement, when he was speaking of the records? A. Yes.

Q. Of daily production? A. Yes.

Q. Then the material in place was about 13 to 33 per cent less than——

A. I don't know. Of course, we have got to figure that out, how much it is. We put that stuff in place, and then we get an estimate after 15 days, and you know how engineers are; sometimes they give you a full estimate, and sometimes they don't give it to you.

Mr. McCall: (Exhibiting paper to Mr. Monteleone) Do you have the original of that?

Mr. Monteleone: We have a copy of it.

Q. (By Mr. McCall): I show you what purports to be a copy of a letter dated May 19, 1945, addressed to Basich Brothers Construction Company, Tucson, Arizona, by Duque & Frazzini, by A. Duque, which states, in effect, that Duque & Frazzini gave orders to Albino and the other employes of Duque & Frazzini to stop work at 9:15 a.m. until the next morning, and that Albino and George Kovich issued orders superseding their orders and kept the men at work. Is that correct, or do you know of your own knowledge?

Plaintiff's Exhibit No. 21—(Continued)
(Deposition of Nick L. Basich.)

A. I suppose it is correct. What happened, they didn't have no material to run the plant, for us to use.

Mr. McCall: This is off the record.

(There was a discussion off the record.)

The Witness: And Duque & Frazzini refused to operate the plant to give us the material to keep the job going, and Mr. Bart Woolums, the representative of the War Department, told us to produce material. And we went down and asked Duque & Frazzini, and they refused to.

Q. Were you present on the job at that time?

A. No.

Q. How did you learn the information you have just stated? A. From Mr. Kovich.

Q. From Mr. Kovich? A. Yes.

Q. Did he tell you or write you?

A. He told me that. I was there next day or two days after.

Q. Were Duque & Frazzini present when this happened, when he told you?

A. No. But Woolums, Bart Woolums, was present when George Kovich ordered those men to work.

Q. Then on May 19th you were not on the subcontract job personally? A. No, I wasn't.

Q. But Mr. Kovich was on there?

A. Yes.

Q. When Duque & Frazzini ordered their men to stop work, your Mr. Albino and Mr. Kovich

Plaintiff's Exhibit No. 21—(Continued)

(Deposition of Nick L. Basich.)

ordered them to continue work, and they did continue work; is that correct?

A. I suppose so. I wasn't there.

Q. That is what Mr. Kovich reported to you the next day? A. That is right.

Q. Do you know what the duties of Albino were at that time?

A. Albino was a crusher foreman all the time.

Q. How long had he been working for you prior to this time?

A. Off and on since 1938 or '39.

Q. In your complaint here you allege that the defendant Glens Falls Indemnity Company executed a surety bond on about February 29, 1945. When did you first personally see that bond?

A. I don't know when I saw it. I don't know the date.

Q. Do you know about what date?

A. I don't know if I ever saw the bond. I don't think I saw the bond until some time in the latter part of April or May, because the bond came back in the office and stayed in the office all the time.

A. Do you know where it was signed by Frazzini? A. No, I don't.

Q. Who sent it to your office, if you know?

A. Frazzini.

Q. Frazzini sent it to your office in Alhambra?

A. I think so. I don't know who did it, but—

Q. Well, that is all right. Do you know whether

Plaintiff's Exhibit No. 21—(Continued)

(Deposition of Nick L. Basich.)

or not Frazzini delivered it to Mr. Kovich in Tucson? A. I don't know.

Q. At the time you signed the contract with the alleged subcontractors Duque & Frazzini, do you know if they were licensed contractors in Arizona?

A. No.

Q. They were not, or you don't know?

A. No.

Q. What do you mean by "no"?

A. I don't know.

Q. You did not know? A. No.

Q. Do you know yet whether they were licensed to contract in Arizona? A. No, I don't.

Mr. McCall: That is all. Have you any questions?

Mr. Monteleone: That is all. I have no questions.

/s/ NICK L. BASICH.

State of California,

County of Los Angeles—ss.

I, C. W. McClain, a Notary Public in and for the County of Los Angeles, State of California, duly commissioned and qualified to administer oaths, hereby certify that Nick L. Basich, the witness named in the foregoing deposition, was, before the commencement of his deposition, by me duly sworn to testify the truth, the whole truth and nothing but the truth; that said deposition was taken before me as such Notary Public, pursuant to Stipu-

Plaintiff's Exhibit No. 21—(Continued)

lation to Take Deposition hereto annexed, at the office of Stephen Monteleone, Suite 1050 Petroleum Building, 714 West Olympic Boulevard, in the City of Los Angeles, County of Los Angeles, State of California, on Friday, June 21, 1946, commencing at the hour of 2:00 o'clock p.m. of said day.

I further certify that the said deposition was written down in shorthand writing by me and was thereafter transcribed into typewriting under my supervision, and that the typewritten deposition was submitted to the deponent for reading, and that deponent, after reading the same, made the following corrections or changes in said deposition, giving the following reasons for such changes or corrections:

Page 6, Lines 18 and 19. Strike out "to go to" and insert in lieu thereof "for the." The witness stated that the substituted words better expressed his meaning.

Page 15, Line 20. Insert the word "dirt" between the words "sand" and "and." The witness stated that the word "dirt" should be inserted in that place.

Page 25, Line 3. Add at the end of line 3 the words "as provided in the contract." The witness stated that those words should be added there.

Page 25, Line 21. Strike out the word "money" and insert in lieu thereof the word "men." And add at the end of line 21 the following: "and

Plaintiff's Exhibit No. 22—(Continued)
writing by a shorthand reporter, and thereafter transcribed into typewriting by him or under his direction, and may be read and corrected by the witness, and that the said deposition may be read and used in evidence in said cause, on any trial thereof or proceeding therein, subject to the same objections and exceptions as if said witness were personally present and testifying on the stand, but without objection or exception to the time, place or manner of taking the same, or the form of the question, unless noted at the time.

Dated this 17th day of July, 1946.

/s/ STEPHEN MONTELEONE,
Attorney for Plaintiff.

/s/ JOHN E. McCALL,
Attorney for Defendant
Glens Falls Indemnity Co.

Plaintiff's Exhibit No. 22—(Continued)

In the District Court of the United States for the
Southern District of California, Central
Division

No. 5021-PH

BASICH BROTHERS CONSTRUCTION

COMPANY, a corporation,

Plaintiff,

vs.

GLENS FALLS INDEMNITY COMPANY, a
corporation, and ANDREW DUQUE and
CARSON FRAZZINI, co-partners doing busi-
ness under the name of DUQUE & FRAZZINI,

Defendants.

DEPOSITION OF GEORGE W. KOVICK

called as a witness on behalf of defendant Glens Falls Indemnity Company, on Wednesday, July 17, 1946, at the hour of 1:00 o'clock p.m. of said day, at the office of Stephen Monteleone, Esq., 1050 Petroleum Building, 714 West Olympic Boulevard, Los Angeles, California, pursuant to Stipulation to Take Deposition hereto annexed, before C. W. McClain, a Notary Public in and for Los Angeles County, State of California.

Appearances:

For the Plaintiff Stephen Monteleone, Esq.

For Defendant Glens Falls Indemnity Co.: John E. McCall, Esq.

Plaintiff's Exhibit No. 22—(Continued)

GEORGE W. KOVICK

called as a witness on behalf of Defendant Glens Falls Indemnity Company, having been by me first duly sworn, testified as follows:

Direct Examination

By Mr. McCall:

Q. Will you state your name to the reporter, and your address, please, Mr. Kovick?

A. George W. Kovick, 145 West Shields Avenue, Fresno, California.

Mr. Monteleone: Do you have a phone there, George? A. Yes.

Mr. Monteleone: What is it?

A. 44878.

Q. (By Mr. McCall): What is your business, Mr. Kovick? A. Contractor.

Q. How long have you been in the construction business?

A. You mean for myself or the entire period?

Q. Altogether. A. Fifteen years.

Q. Are you acquainted with Nick L. Basich, of the Basich Brothers Construction Company?

A. I am.

Q. How long have you known him?

A. Since 1936.

Q. Are you related to him? A. No, sir.

Q. Have you worked for the Basich Brothers Construction Company? A. Yes, sir.

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Q. Had long had you worked for them prior to 1945? A. Since April, 1936.

Q. During 1945 were you the General Superintendent for Basich Brothers Construction Company at Davis-Monthan Field, in Arizona?

A. Yes, sir.

Q. And as General Superintendent you had charge of all the work in connection with the air field contract? A. Yes, sir.

Q. When did you go to Tucson on the job in question? A. February 11, 1945.

Q. Had any construction work been done on the job before you got there? A. Yes, sir.

Q. Who was superintendent during that work?

A. Mr.—I am trying to recall his name.

Q. You can't recall his name?

A. I can't recall his name. He was in charge of all operations up to the time I arrived on the job.

Q. What was the nature of the work which had been done under the contract on the air field prior to February 11th?

A. Preparatory work, consisting of stripping grading areas, some grading work, and a small amount of excavation for drainage work, and the usual setting up of shops and repair facilities, and miscellaneous preparations.

Q. From February 11th, 1945, you were on the job continuously until it was completed?

A. Yes.

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Q. Do you remember the date of completion?

A. It was in the neighborhood of October 25th, I believe, but the job wasn't accepted until some time later.

Q. About October 25th was when the last work was done on the job?

A. Yes. All the work was completed on that date.

Q. Do you remember the date that the last work was done on what is called the subcontract of Duque & Frazzini?

A. Do you have reference to the last date they pulled off the job?

Q. I have reference to the date that the last material was produced in the pit or on the subcontract.

A. I can't recall the last date without checking the records.

Q. Are you acquainted with Andrew Duque and Carson Frazzini? A. I am.

Q. And they had a subcontract or a contract under Basich Brothers for furnishing some material? A. Yes.

Q. Did you ever see the contract or subcontract?

A. Yes, sir.

Q. You are familiar with its terms?

A. Yes, sir.

Q. With reference to the Basich contract at the air field, where was the subcontract work of Duque & Frazzini located, how far and in what direction?

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

A. They were located in the pit, about four miles north and east of the air field, on property owned by Mr. and Mrs. Golub.

Q. Did you help prepare this bill of particulars?

A. In what respect?

Q. Did you help assemble the material that is in here?

A. No, sir.

Q. Have you ever looked over this bill of particulars since it was prepared?

A. No, sir.

Q. You are not familiar with the structure of it, then?

A. No, sir.

Q. Are you acquainted with Jack Brown, who is shown to have worked on the alleged subcontract of Duque & Frazzini?

A. I may know the man, but I don't recall his appearance or his duties on the project.

Q. He is listed as tractor drive. Does that recall to your mind his work?

A. I do recall tractor drivers on the project, but I wouldn't know them by name at this time.

Q. In connection with the employes on the subcontract, do you know who set the wages for regular time and overtime?

A. Me, and the unions.

Q. That was set by the unions?

A. It was set by the unions and also in the general specifications covering the work.

Mr. Monteleone: You mean in the general specifications prepared by the United States Government?

A. That's right.

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Q. (By Mr. McCall): What hours, if you know, are meant by "regular time"?

A. The first eight hours an employe works during the weekly days, consisting of Monday, Tuesday, Wednesday, Thursday and Friday.

Q. Then the first five days in the week, excepting the first day, which is Sunday?

A. Yes, sir.

Q. Each employe on the job was on regular hours the first eight hours he worked?

A. Each day, yes, sir.

Q. No matter what time he started?

A. That's right. That was contrary to the union provisions. They have a clause stating that regular time starts at 7 a.m. in the morning, whereas it is customary with contractors, if the men are willing to start at six or five, for the regular time they start, that that is the time they start work.

Q. This statement shows, for instance, from February 11th to February 17th, 14 hours regular time and 20.5 hours overtime. Do you have any recollection as to the time this particular tractor driver Jack Brown worked? A. No, sir.

Q. Did some of the employes work regular time for Basich Brothers Construction Company away from the pit and some overtime on the same day on the Duque & Frazzini job?

A. There may have been a few instances, where they requested the services of a man for about half

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

an hour or an hour in the evening. There were occasions where they required the services of one of our men for a matter of a short period, say half an hour or an hour, where the man would work on our payroll for 10 hours, and after the completion of his 10 hours he would go over and take care of Duque & Frazzini's work, in which case we paid the man eight hours regular time, plus two hours overtime, plus whatever work he did for Duque & Frazzini. That wasn't customary. That was an occasional happening.

Mr. Monteleone: Let me just ask a question. At whose request were the men working for Basich Brothers called on to do work for Duque & Frazzini?

A. Mr. Duque or Mr. Frazzini would request myself or one of my foremen to send a man over to their plant that evening, and also outline the type of work that he would perform for them, whether it was clean-up work or repair work, or whatever the nature of the work was.

Q. (By Mr. McCall): Then one of the men working on the main job for Basich Brothers worked for Duque & Frazzini overtime where you instructed them to?

A. That's right.

Q. Then you knew about each instance of that kind that happened?

A. Yes, sir.

Q. The place you mentioned as being four miles

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

from the air field, where the material was produced, was referred to as the "pit", was it not?

A. Yes, sir.

Q. And when you refer to the "pit", you mean the work known as the Duque & Frazzini subcontract?

A. In other words, that was the area where they obtained and processed materials on their subcontract, for their subcontract.

Q. Did you go over to the pit on the 11th of February, the first day you arrived in Tucson?

A. Yes, sir.

Q. What work did you find going on there that day?

A. If I recall, Duque & Frazzini were erecting a small crushing plant.

Q. What kind of a crushing plant was it?

A. Well, it was what we would call a home-assembled plant. In other words, there are several types of equipment involved in it. It wasn't a trade-marked plant manufactured by one manufacturer; it was a series of conveyors made by one manufacturer, and bunkers by another, and the crusher by a third, and a power plant by a fourth.

Q. Did you talk to Duque & Frazzini that day?

A. I don't recall.

Q. Were any tractors working on the site that day, at the pit?

A. I don't recall that either.

Q. Do you know if any work had been done in

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

the pit by Basich Brothers Construction Company prior to February 7, 1945?

A. I couldn't recall that, sir.

Q. After February 11th, did you visit the pit every day through February? A. Yes, sir.

Q. Were both Duque and Frazzini there each day?

A. No. Mr. Frazzini was there the largest part of the time in February, and Duque showed up on the job some time in March, if I recall correctly.

Q. Then what time did they finish the construction, if you remember, of this home made crusher plant that you referred to?

A. I would have to check on my records for that. I am hazy on dates.

Q. Do you have your books with you, that most contractors prepare during the construction of a job?

A. No. I believe that is in the files of Basich Brothers Construction Company. We generally keep a job diary.

Q. What do you call the job dairy—the "black book?" A. No.

Q. What is it?

A. In this case it was a little brown book, used for my convenience, more than anything else, showing the starting date of the project and the arrival of the various types of equipment on the project.

Q. Did you mark in there the date Duque &

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Frazzini completed construction of the first crusher plant, or the assembling of it?

A. No. I marked down the first date they started producing material.

Q. What was that date?

A. I don't recall at the moment.

Q. Would you say it was in February?

A. I presume it was in February, the latter part of February.

Q. Then as soon as you reached the job on February 7th did you start moving in and assembling what was called the Pioneer crusher plant?

A. No, not as soon as I arrived on the job. The Pioneer was parked near the pit. I can't be definite as to how long it stayed in that location before Duque & Frazzini requested that we start setting it up for them.

Q. Then you did not start setting the Pioneer plant up at or in the pit until you were requested to do so by Duque & Frazzini?

A. That's right.

Q. You are sure of that?

A. I am sure of that.

Q. Then it is not true that the Pioneer plant was constructed as a standby, just in case it was needed?

A. The Pioneer plant was hauled to Tucson, to be used as a standby in case they needed it. In other words, Basich Brothers had their transportation haul it down to Tucson to use as an emergency

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

machine in case the Duque & Frazzini equipment might fail them.

Q. Then was it erected on the job under that condition, as a standby or to be used——

A. It was erected on the job to be used.

Q. When did you start the erection of the Pioneer plant on that job?

A. I can't recall the date. But I will make another statement relative to that, and that is that Duque & Frazzini incorporated part of the second plant they set up with our Pioneer, to give them the necessary screening and storage capacity at the plant. Can we go off the record for a moment?

Mr. Monteleone: No. Just answer the questions.

Mr. McCall: Will you read that statement, please. I am not sure I got it all.

(The last answer was read by the reporter.)

Mr. Monteleone: Do you want to explain that answer?

The Witness: Yes.

Mr. Monteleone: You may do that.

The Witness: In other words, to obtain the type of plant they wanted and the segregation of the various sizes of rock that would be required, we didn't have sufficient bunkers or screening capacity on the Pioneer alone, so they used parts of this second plant they brought in for the purpose of making concrete aggregate, and they installed bunkers and screens and conveyors as they saw fit.

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Q. (By Mr. McCall): How long was this after February 11th when you started installing the Pioneer?

A. I am sorry, but I can't recall the date.

Q. Do you remember when you completed the installation of the Pioneer plant?

A. I believe it was some time in March.

Q. Was it around March 25th?

A. I can't recall.

Q. Do you remember the first day the Pioneer plant produced material? A. No, I don't.

Q. Then you referred to the second plant installed by Duque & Frazzini. What was the name of that plant?

A. It was a plant made up of various trade-marked machinery, under their supervision. It was a simple plant, consisting of bunkers, screens, and so forth, with electric motor drive. In other words, it wasn't a trademarked plant.

Q. What was it to produce?

A. Concrete aggregate.

Q. It did not crush rock? A. No.

Q. Is that the plant you call the sand plant?

A. No; that was a separate plant.

Q. Then was the one for concrete aggregate installed prior to the home-made rock crusher plant or afterwards? A. Afterwards.

Q. When was it installed?

A. Some time in March.

Q. Was it put on production prior to the be-

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

ginning of work by the Pioneer? A. Yes, sir.

Q. How long did it operate?

A. About two or three days.

Q. And broke down?

A. No. They couldn't meet the specifications for the rock required on the project. They couldn't screen it clean enough to take the dirt and sand out of the rock.

Q. So that plant was abandoned, after two or three days' work; is that right?

A. That's right.

Q. So the only plant they had operating then, except the second plant that you just mentioned, was the home-made plant, up until the time the Pioneer plant started crushing rock?

A. Yes, sir.

Q. And the second plant you mentioned never did produce any material acceptable to the engineers? A. That's right.

Q. Then, after the Pioneer plant started operation, was there another plant later on installed?

A. Yes, a plant for producing sand.

Q. And when was it installed?

A. I can't recall the date.

Q. In February or March?

A. It was March or——

Q. In March or April? A. Yes.

Q. The latter part of March or April?

A. That's right.

Q. Who did it belong to?

A. Duque & Frazzini.

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Q. So Duque & Frazzini owned te home-made rock crusher plant and the sand plant?

A. Yes, sir.

Q. Up to now you have spoken of the home-made rock crusher plant and the second plant, which, for all practical purposes, never did operate?

A. Yes.

Q. And the sand plant, which belonged to Duque & Frazzini, and the Pioneer plant, which belonged to Basich Brothers. A. Yes, sir.

Q. Was there another plant later installed on the job?

A. Yes, in the latter part of May or the first part of June.

Q. Who did it belong to? A. PDOC.

Q. What kind of a plant was it?

A. It was a Cedar Rapids.

Q. Under whose authority was it installed on the job? A. Basich Brothers.

Q. That was the latter part of May?

A. Or June, I believe.

Q. How long did it take to move it on the job and install it?

A. A matter of four or five days.

Q. That was done under your supervision?

A. Yes, sir. May we refer to Duque & Frazzini's rock crushers as "job assembled plants," rather than "home-made," due to the fact that the term "home-made" may be misleading, as meaning manufactured by Duque & Frazzini. In other words, it

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

was a plant composed of various types of equipment assembled on the job.

Q. You say you were at the pit every day from February 11th during the month of February?

A. Yes, sir.

Q. What kind of work were you superintending out there during that time?

A. The entire project, the production of material and all work performed on the airport itself.

Q. But at and around the pit what kind of work were you performing?

A. Supervising work relative to the necessary production of material.

Q. Can you recall the day that you first produced material at the pit?

A. I cannot, sir.

Q. Would you say that you produced material there before February 19th?

A. I don't recall. I believe it was after, after the 19th, the 19th or after before the first material came out.

Q. What kind of material was produced then?

A. Crushed rock base.

Q. That was the only material produced until when?

A. Until some time in March.

Q. When the Pioneer plant—

A. When the Pioneer plant was set up.

Q. On the first day you operated do you remember how much material you produced?

A. No, sir.

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Q. Did you make a note of it at the time, as to how much material was produced?

A. An approximate amount.

Q. How long has it been since you saw the record that you made that day?

A. About ten months.

Q. Did you make a record then of the approximate amount of material produced each day during February?

A. I didn't make a record each day, but I had men that kept records each and every day.

Q. Did this plant produce as much as 800 cubic yards per day during the month it operated, in February?

A. I can't recall, unless I refer to the records.

Q. Then your answer is that you do not know at this time—it may have produced 800 cubic yards or more per day during February?

A. At this time I can't state, unless I would refresh my memory by going over the records.

Q. During the month of March, prior to the beginning of production with the Pioneer plant, did you keep a record or have a record kept of the production each day? A. Yes, sir.

Q. Do you remember how much it produced on any day during that time? A. No, sir.

Q. Then it may have produced during February and March 800 or more cubic yards of material each day, as far as you can remember at this time?

A. I would have to check the records on that.

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

Q. You have no independent recollection of the amount produced, at this time?

A. From independent recollection, I would say, I would assume it was under 800 tons per day average.

Q. Did you discuss this under-production at any time during February with Duque & Frazzini?

A. I don't believe I discussed the production with them on the rock base until some time in March.

Q. What time in March does that have reference to?

A. I can't recall the date. In other words, in assembling the plant there were a few minor corrections required on the plant which required a period of time, and until I knew they had made all the adjustments necessary on the plant I wouldn't press them for higher production.

Q. How long, approximately, did it take to make the necessary adjustments and corrections on the plant?

A. They made a small amount of corrections each and every evening on completion of the shift.

Q. Did they ever work the plant two shifts?

A. One shift.

Q. Eight hours? A. Ten hours.

Q. Did they continue to make corrections as long as they operated the plant?

A. They did for a while, yes.

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Q. How long did it take them to get the plant in first class condition, if ever?

A. That would depend on what a man calls "first class condition."

Q. Did they ever get it in what you call "first class condition?"

A. They had it in good running order for a short period.

Q. When it was in good running order do you believe it produced 800 yards per day?

A. On various dates it did produce 800 or over, on certain dates.

Q. Do you know Paul Albino?

A. Yes, sir.

Q. Was he already on the Basich job when you reached the job February 11th? A. Yes, sir.

Q. What kind of work was he doing?

A. He was a mechanic at the time—general assembly work.

Q. And later did he start to work for Duque & Frazzini? A. Yes, sir.

Q. What time was that?

A. I can't recall the date.

Q. Was it the same day you reached the job, February 11th? A. I doubt it.

Q. He was a mechanic for Basich when you reached the job on February 11th?

A. Yes, sir.

Q. And he had been for quite a while?

A. Yes; he was doing mechanical work at the

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

time. He normally was crusher operator and foreman.

Q. He had been a crusher operator and foreman before? A. That's right.

Q. Had he previously operated the Pioneer plant? A. That's right.

Q. And he assisted you on the installation of the Pioneer plant on the job?

A. He assisted Duque & Frazzini in the installation.

Q. After it was installed he operated it, or it was operated under his supervision?

A. That's right.

Q. You supervised the erection of the Pioneer plant, did you not? A. No, sir.

Q. You had nothing to do with the installation?

A. No, sir.

Q. And all of that was done by whom?

A. Duque & Frazzini.

Q. You were there every day during the time it was installed? A. Yes, sir.

Q. What did you do, then, if anything, with reference to the installation of the Pioneer plant?

A. Very little, other than that it be set up and operated by a certain date.

Q. What was that certain date?

A. I can't recall at the moment. In other words, we had a time schedule on the job, and in order to start paving operations on a certain date we had

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

to start crushing operations two or three days prior to that.

Q. When did the schedule start—when did the schedule call for starting paving on the job?

A. I can't recall without checking the records.

Q. Then the only thing you had to do with the installation or the operation of the Pioneer plant was to insist to Duque & Frazzini that they get it constructed and in operation at a certain time?

A. No; it wasn't a case of insisting, due to the fact that they were coming along on schedule with their installation.

Q. What time is this that you say they were coming along on schedule with their installation?

A. As I said before, I can't recall dates from memory between these particular operations.

Q. You refer to the schedule of the installation of the Pioneer plant, or of all of the equipment?

A. All of the equipment. At the same time I was installing a batch plant for combining our concrete aggregate at a location near the Pioneer crusher, I was also installing an asphalt plant across the street.

Q. What was this plant that you say you were installing or installed—for combining materials?

A. That's right.

Q. Where was that installed?

A. About 200 feet south and east of the Pioneer structure.

Q. That was in the pit? A. Yes, sir.

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Q. What work did this plant perform?

A. It weighed and combined the proportions of rock and sand, the amount required in every batch of concrete.

Q. Then after it weighed and combined your rock and cement, what became of the rock and cement?

A. It was hauled to the airport on a truck and dumped into a cement mixer.

Q. A Basich truck?

A. A Basich truck or trucks rented by Basich Brothers.

Q. Then the asphalt plant, where do you say that was located?

A. Across the county road from the Pioneer crusher. In other words, the pit was split in two by a county road. We had Duque & Frazzini's rock crusher on the south, in the south pit, and the batch plant and the Pioneer and the sand plant in the north half of the pit.

Q. When did you first notice, if you ever did, that Duque & Frazzini were not producing the material which was required by their contract?

A. Oh, I would judge around the latter part of March.

Q. Up until that time you had not noticed that they were not producing material according to their contract?

A. Well, I may have noticed, but I may have been under the assumption that they would make

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

up their production either by double shifting or employing their machinery so that it would produce more per shift.

Q. Had you talked with them *it* prior to the latter part of March?

A. Yes, I believe I had.

Q. Where was that—out at the pit?

A. Out at the pit.

Q. Who was present at the time?

A. Well, I believe at one time there was a chap by the name of Mr. Mitchell. He was an office engineer of Basich Brothers Construction Company at that time.

Q. What was he doing at the pit?

A. He and I went out to measure the quantity of material in the stock pile.

Q. Do you recall the date?

A. No, I don't.

Q. What was said by you to Duque & Frazzini and what was said by them on that date with reference to being behind schedule with their equipment?

Mr. Monteleone: I don't think the witness stated that they were behind schedule at that time.

Mr. McCall: Well, he can state what he remembers.

The Witness: Mr. McCall asked whether or not I had any recollection of any discussion we may have had in the pit prior to the end of March, to which I answered that we had several discussions,

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

at which times Mr. Duque or Mr. Frazzini told us that they would either double-shift or make the necessary improvements to pick up the production. At that time I didn't consider it a serious matter, due to the fact that I took them at their word that they would make these necessary corrections and adjustments and pick up their schedule.

Q. Was that prior to the time you started the installation of the Pioneer plant?

A. That was about the time we were installing the Pioneer plant, or shortly after its installation.

Q. Do you recall what their production record was up to the time you discussed it with them and they said they would make the necessary corrections?

A. I don't remember.

Q. Was there a time-keeper on the Duque & Frazzini job?

A. Not that I know of.

Q. Did you have a time-keeper on the main job, the Basich job?

A. Yes.

Q. What was his name?

A. Homer Thompson.

Q. Did he go out on the job and get the fellows' times, or did he just take it from someone in the office?

A. Each foreman turned in time cards, at the end of each and every day, covering all men working under his supervision. These time cards were signed by the men and approved by the foremen, and forwarded to our office. And Mr. Thompson also had an office force that assisted him in com-

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

piling all the necessary records for the payment of these people. In regard to Duque & Frazzini, Mr. Duque would bring in their time cards, and sometimes Mr. Frazzini, or sometimes the foreman they had; I believe his name was Hampton. In other words, they would turn in time cards for all men working under Duque & Frazzini.

Q. Then all the time cards turned in by Duque or Frazzini or Hampton would be signed by them, along with the signatures of the workmen?

A. I assume so.

Q. Do you know whether they were or not?

A. In most cases they were, yes, or by Mr. Albino.

Q. Then Mr. Albino signed the time cards of the workmen too, did he? A. Yes.

Q. Workmen on the Duque & Frazzini job?

A. Yes. They were working under him on the Pioneer project. Mr. Albino had charge of the Pioneer.

Q. Then, Mr. Kovick, when a foreman on the subcontract job, or Duque and Frazzini, or the foreman on the Basich job, as the case might be, took a time card and had it signed by the workman and signed it himself, what did he do with it?

A. He, in turn, brought the time card to the office in person, or else sometimes I picked them up, or Mr. Thompson picked them up, and brought them to the office.

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Q. The office you refer to was the Basich Brothers Construction Company office, which was located on the project; is that right?

A. That's right.

Q. Then after they were brought to the office who were they turned over to?

A. Mr. Thompson.

Q. Mr. Thompson was in charge of that office?

A. Yes.

Q. As far as the bookkeeping was concerned?

A. Yes, sir.

Q. But all of it was under your supervision?

A. Yes, sir.

Q. Did he keep the records of the employes on the Duque & Frazzini job separate from the records of the employes on the main Basich job?

A. Yes, sir.

Q. How were the employes paid their wages or salaries—by check or cash?

A. By check.

Q. And those were Basich Brothers Construction Company checks?

A. Yes, sir.

Q. Then the employes on the Duque & Frazzini job did receive their checks at the Basich office, or were the checks brought to the pit?

A. The checks were generally brought to the pit and given to Mr. Frazzini or Mr. Hampton or Mr. Duque.

Q. The workmen's compensation, I believe, was carried by the State Fund, was it not?

A. Yes, sir, the State of Arizona.

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Q. The employes on the Duque & Frazzini job were listed on the workmen's compensation of Basich Brothers? A. Yes, sir.

Q. Was that by some agreement between Basich Brothers and Duque & Frazzini?

A. I assume they had something in the contract to cover that and advancing money for payrolls.

Mr. Monteleone: The contract speaks for itself. If you don't know what arrangements have been made, just simply state that you don't know of your own knowledge of any arrangement to that effect. The contract speaks for itself, and there is a provision in that regard, but you are not supposed to state that. That is for the court to determine, what the contract provides.

The Witness: Yes, sir.

Q. (By Mr. McCall): Then you do not know of any agreement between Duque & Frazzini and Basich Brothers, outside of the subcontract, with reference to paying the workmen of Duque & Frazzini on the Basich Brothers Construction Company compensation policy? A. No, sir.

Q. Do you know how many times, if any, the State Fund auditors audited the payroll of Basich Brothers Construction Company and the Duque & Frazzini job while it was under construction?

A. Oh, quite a number of times.

Q. Do you know if they made a separate audit of the Duque & Frazzini employes, or if they

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

audited those along with the Basich Brothers Construction Company employes?

Mr. Monteleone: Do you know of your own knowledge?

A. No, I don't know whether they made it separate or—They made separate audits of all operations on the job, to break it down into proper classifications for the various rates of insurance which applied in each operation.

Q. (By Mr. McCall): Who determined the regular time and the overtime of each employe on the subcontract job?

A. The general specifications covering the work and also the various union crafts.

Q. Did they determine whether a man should work so many hours regular time and so many hours overtime, the same day?

A. That was up to the contractor.

Q. Do you remember when Duque & Frazzini first stockpiled material?

A. I can't recall the date, but I do have records of it.

Q. What was the occasion for stockpiling material—because your trucks were not able to haul it fast enough?

A. No, sir. It was a safety provision, to supply us with rock base when their plant was broke down.

Q. I believe you said you do have records showing how much material, or approximately how

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

much, was produced each day in February and March? A. Yes, sir.

Q. And, for that matter, for the entire time that Duque & Frazzini were on the job?

A. Yes, sir. Our records——

Q. Do you know where those records are?

A. I believe they are in the Basich Brothers files.

Q. What is the name of those records?

A. The truck time sheets I believe would show the approximate quantities each day.

Q. Do you know whose supervision they are under?

A. They were under Mr. Thompson's supervision. These records we speak of were kept strictly for ourselves, for Basich Brothers, due to the fact that all payments made to Duque & Frazzini were paid on an in-place quantity. In other words, those were paid according to the engineer's estimates of materials on the air field, whereas we kept these records for our own convenience, mainly to cover the movement and operation of the trucks, and also for estimating amounts of material hauled to the airport by a certain date and the amount required to complete a certain section, but in reality they weren't for keeping the Duque & Frazzini production.

Q. Some of the material was paid for by the truck load, was it not?

A. By Duque & Frazzini?

Q. Yes.

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

A. Yes, I believe there was some paid by the truck load.

Q. Do you know what material that was?

A. There was some type of rock base, a small amount or rock base, paid by truck loads.

Q. Is this Mr. Thompson working in the Basich office now?

A. At Oceanside, the field office.

Q. Where are the records now, if you know, which were kept for the Davis-Monthan Field?

A. I really wouldn't know where they are now.

Q. You don't know whether they are at the main office of Basich Brothers Construction Company or not?

A. I really couldn't say.

Mr. Monteleone: I again, Mr. McCall, reiterate the offer which I have made to you and your company on various occasions, that all the records of Basich Brothers Construction Company in connection with the Duque & Frazzini subcontract are open to your inspection and investigation at all reasonable times. If you care to send an auditor to the office where the records are being kept, they will be open to your auditor.

Mr. McCall: Where are the records?

Mr. Monteleone: They undoubtedly are at the main office in Alhambra. That would be the natural place for them to be. From general statements made to me, I assume they are there.

Mr. McCall: Then on notice of a day or so you would let an auditor that we may select, or someone,

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

or me, go over to the office and look over these records; is that right?

Mr. Monteleone: That offer has been made to you at all times. Make it a reasonable time, five or six days, or something like that—a few days ahead of time. Don't wait until the last day before the trial.

Q. (By Mr. McCall): I will ask you, Mr. Kovick, if you know, did Duque & Frazzini have in operation at any time on the subcontract job in question, two plants producing 800 cubic yards of suitable material per day?

Mr. Monteleone: You mean actually producing or capable of producing?

Mr. McCall: Actually producing.

The Witness: On any one specific day, or over a period of time?

Q. (By Mr. McCall): Any one specific day.

A. Well, as I stated before, one plant did produce over 800 tons per day, and I have reference to the small crusher plant we discussed previously. But I would have to check the records as to whether or not both plants operated on the same date and also whether both plants exceeded 800 tons per day on that date.

Q. Are you confused, Mr. Kovick, as between tons and cubic yards? A. No, sir.

Q. Then the unit of measure they were to produce was tons, and not cubic yards?

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

A. No. It varied. They had cubic yards on the rock base and tons on their mineral aggregate for their asphalt material.

Q. Calling your attention to cubic yards of material only, are you prepared to say that they did not at any time have two plants producing a total of 1600 cubic yards per day?

A. I am not prepared to state.

Q. Do you know if they ever produced as much as 1600 cubic yards of suitable material per day between the 11th of February and the 8th of June, 1945?

A. I couldn't state unless I checked the records.

Mr. McCall: Mr. Monteleone, I believe you said you would let us look at those insurance policies, the compensation policies. Do you have them here?

Mr. Monteleone: If you are going to send a man over or are going over to the office, you can check them over at that time, see the whole thing, instead of handling it piecemeal.

Mr. McCall: I had understood that I could see them here at your office.

Mr. Monteleone: I didn't understand that. The question you had was as to whether or not those records stood in the name of Basich Brothers as employers, and when you prepared the admission of facts I told you then that they did stand in the name of Basich Brothers. In making that admission, however, I would not concede that Basich Brothers were, in law or in fact, the employers.

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Mr. McCall: I understand now that the policies will not be brought down to your office for inspection?

Mr. Monteleone: If it is not too much inconvenience to Basich Brothers, I will have them brought down here, yes. I have no objection to that. I didn't understand that you wanted them here at the time of the taking of Mr. Kovick's deposition. How long will you be here, Mr. McCall? I have an appointment which will take probably ten or fifteen minutes.

Mr. McCall: If you have an appointment which you would like to take up for ten or fifteen minutes, go ahead.

(A fifteen-minute recess was taken.)

Q. (By Mr. McCall): What records do you have reference to that you would have to check in order to tell how much material per day was produced?

A. The daily truck time sheets, which carried a tabulation of the approximate amount of material produced each day, in other words, an estimate based on loose truck measure.

Q. Did you have any other records besides the truck time sheets that would show the amount, or the approximate amount, of material produced each day?

A. No, sir.

Q. Did the engineers ever prepare estimates

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

showing the amount of money due to Duque & Frazzini?

A. The Basich Brothers Construction Company engineers did, yes.

Q. The Basich Brothers Construction Company engineers prepared such estimates? A. Yes.

Q. Did they give those to Duque & Frazzini?

A. Yes, sir.

Q. When did they give them the first estimate?

A. I don't recall the date.

Q. How often did they give an estimate after that? A. Whenever requested.

Q. Did they ever request estimates?

A. I don't recall at present whether they did or not.

Q. Do you know whether or not the Basich Brothers Construction Company engineers ever gave Duque & Frazzini more than one estimate showing the amount of work done and what they had coming to them, if anything?

A. I believe so, yes.

Q. Just one time?

A. I believe they submitted estimates to them on several occasions.

Q. On several occasions?

A. Yes, sir. How many I couldn't state.

Q. Did you deliver those estimates to them?

A. As a rule they were picked up in our office by Mr. Duque or Mr. Frazzini.

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Q. What records were the estimates of your engineers taken from?

A. The engineers' estimates, the U. S. Engineering Department, in charge of progress.

Q. The estimates of the U. S. Engineers did not mention Duque & Frazzini? A. No, sir.

Q. But the U. S. Engineers' estimates showed the work, so that you could segregate it, did they?

A. Yes, sir. It was simple to segregate, due to the fact that Duque & Frazzini supplied all the rock base and the material for the concrete that was poured, and all of the materials for the asphalt, those being the quantities we would credit them with on their estimates.

Q. Then during the months of February and March you talked to Duque & Frazzini about bringing up the deficiency in the amount of material, but they didn't increase the amount until the Pioneer plant started operating?

A. Well, that is rather difficult to answer. We discussed the increase in the production of their rock crusher making rock base, increasing it, but until the Pioneer was set up and operating, increasing it I had no reason to argue with them relative to their production of that machine.

Q. Then after the Pioneer machine started operating, do you know if they produced at any time 800 yards per day with the two machines, during the months of April or May?

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

A. Not without referring to the records.

Q. You wouldn't know? A. No.

Q. They may have produced a total of 1600 yards of suitable material per day after the Pioneer machine started operating, but you don't remember?

A. That's right.

Q. But up until the Pioneer plant started operating they only had the one plant operating, which I referred to as the home-made plant; is that right?

A. Other than the several days their concrete aggregate plant operated and their materials couldn't meet specifications.

Q. Couldn't meet specifications?

A. That's right.

Q. Then did you have any conferences with Duque & Frazzini, complaining to them about the production between the 1st of April and the 15th of May?

A. Yes, we had several discussions in that period.

Q. Where did those discussions take place?

A. At the office and in the pit.

Q. At your office?

A. Yes, or in the pit.

Q. What was the nature of your complaint to Duque & Frazzini at that time?

A. To increase the production of materials.

Q. What was the production of materials when you complained?

A. I don't recall the exact yards per day that were being produced at the time.

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Q. Do you remember writing two letters to Duque & Frazzini on May 12th?

A. I recall that I wrote them some letters. I wouldn't know the dates.

Mr. McCall: Mr. Monteleone, you have seen those letters before. Do you have any objection to my showing them to the witness? (Handing papers to Mr. Monteleone.)

Mr. Monteleone (Returning same papers to Mr. McCall): That is all right.

Q. (By Mr. McCall): I show you, Mr. Kovick, what purports to be two letters addressed by Basich Brothers Construction Company to Duque & Frazzini, dated May 12, 1945. at Tucson, Arizona, and ask you if you signed each of those letters?

A. Yes. This is my signature on both letters.

Q. While you look at those letters, Mr. Kovick, I call your attention——

Mr. Monteleone: By the way, Mr. McCall, are you offering those letters in evidence now?

Mr. McCall: No.

Mr. Monteleone: Then I am going to object to your calling attention to any portion of the letters, unless they are put in evidence.

Mr. McCall: I have already offered the letters in evidence. They were marked at the pre-trial.

Mr. Monteleone: Pardon me.

Mr. McCall: They are already in evidence.

Mr. Monteleone: All right. These are the same

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

letters, then, that were referred to in the deposition of N. L. Basich?

Mr. McCall: That's right.

Q. (By Mr. McCall): Can you state which one of these letters was written first on May 12th, Mr. Kovick?

A. I believe this letter was written first of all.

Q. Referring to the letter beginning with what words?

A. "In your letter of May 8, 1945."

Q. That was the first letter written on May 12th?

A. Yes.

Q. That letter you refer to reads, in part: "Since you lack proper and adequate equipment to operate even on a single shift basis without breakdowns, we suggest that any materials made on a night shift be placed in stockpile from which we will reload at our expense." What equipment did Duque & Frazzini have on the job when you wrote this letter of May 12, 1945?

A. This letter had reference to their rock base crushing plant.

Q. The one that was referred to as beginning work first?

A. In the letter of May 8th, they were feeding the plant with a yard and a quarter shovel and a tractor, the combination of the two, and they were using this job-constructed plant, crushing plant, the home-made plant which has been referred to.

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Q. Is that the only one they had in operation?

A. No. We had the Pioneer in operation at that time.

Q. This letter, then, had no reference to the Pioneer plant?

A. No. This first letter here had reference to the rock base plant.

Q. Which was the job-constructed plant?

A. Yes. If you will notice, on the bottom it does say: "The above statement regarding lack of proper equipment can be verified from our daily production records of rock base deliveries from your plant." In other words, this referred to rock base alone.

Q. Those daily production records referred to in the last paragraph, what kind of records do those refer to?

A. Time sheets showing the working time of the crusher during the day, the time it starts and the time of every breakdown, and the time it starts again and the time it stops for the evening.

Q. Who kept that record? A. Our man.

Q. What man? A. The truck checker.

Q. What became of those records?

A. They are part of the records that Mr. Monteleone discussed, which may be up at our office.

Q. How far do those records go back?

A. To the beginning of the job.

Q. And those records will show the daily time, hours, that the machine referred to as the "job-constructed machine" worked, from the beginning of

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

the job, as long as Duque & Frazzini were there?

A. Yes, sir.

Q. They also show the time worked by the other plants, including the Pioneer; is that right?

A. No. We didn't make a break-down on the Pioneer in that respect, due to the fact that the Pioneer production was going directly into the stock-pile, rather than on the grade, and our means of checking the production there was by the number of cubic yards placed on the grade.

Q. So you didn't keep any records of the time worked by the Pioneer?

A. Not like on the home-constructed machine.

Q. Does this record show how much crushed rock was produced by this home-constructed machine each day?

A. How many loads, yes.

Q. Each day?

A. Yes, sir.

Q. How much was supposed to be in each load?

A. We had a segregation of large trucks and small trucks, and we estimated the amount we thought each truck would hold.

Q. Did you ever check that estimate with the engineers' figures in place?

A. Yes, sir.

Q. How did they compare?

A. We were heavy on the figures, on the truck figures. In other words, the shrinkage of the material was greater than we figured it would be.

Q. Do you remember the percentage the shrinkage ran to?

A. No, sir, I don't recall.

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

Q. Calling your attention to the other letter which was written on the same day, May 12th, which begins, "In spite of our verbal requests, letters and further requesting your Bonding Company representative to investigate conditions relating to your production of materials, we have received no improvement whatever on your material deliveries," what material deliveries did you have reference to?

A. All materials.

Q. Of every kind?

A. Yes; sand, concrete aggregate, mineral and crushed rock base.

Q. What was the status of the material deliveries when you wrote this letter?

A. We were forced to shut down our concrete paving operations on that date, due to the fact that the job-constructed plant couldn't produce sufficient rock base for us to prepare sub-grades ahead of concrete paving operations.

Q. How long did it stay shut down?

A. I would have to check the records for that.

Q. Had your concrete paving operations been shut down at any time before May 12th for lack of material?

Q. I would have to check the records for that. It was shut down due to lack of material. On which date, I can't recall.

Q. Do you remember how many times it was shut

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

down due to lack of material from the subcontractor prior to May 12, 1945?

A. No, sir, I couldn't say.

Q. Would you say it was a dozen times, or more or less? A. I couldn't tell you.

Q. It might have been a dozen times, or more or less?

A. I would have to check the records for that.

Q. From your independent recollection at this time, you wouldn't know how many times?

A. I can hardly give an independent recollection if I am not certain.

Q. What do you mean by "standby charges resulting from this lay off," referred to in the last paragraph of your letter?

A. The rental of the various types of equipment, rented by the month, for the various operations, such as concrete paving, which includes your concrete mixers and finishing machines.

Q. That was on the main job? A. Yes.

Q. On the air field?

A. In other words, all equipment that was tied up due to their lack of material, due to the machinery.

Q. And you charged all of that to Duque & Frazzini?

A. I presume we did. Mr. Thompson will remember.

Q. Do you remember the first time you had to

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

shut down your operations for lack of material furnished by Duque & Frazzini?

A. No, sir.

Q. Do you know of your own knowledge how much material the Pioneer plant produced after it started operating?

A. Not to an exact amount, no, sir.

Q. What did you refer to when you stated, in part, "you lack proper and adequate equipment?"

A. They lacked the proper equipment to strip their pits and remove the over-burden. By "over-burden" we refer to the dirt laying on top of the rock deposits. They lacked sufficient trucks to feed their plant properly, and their crusher was gradually becoming run down, to a point where it was continuously breaking down during each and every shift.

Q. And taking off this dirt from the pit is what you call stripping the pit? A. Yes, sir.

Q. What did they do with the dirt that was taken off?

A. They put it in other parts of the pit, wasted it within the pit limits.

Q. That is the only thing you had reference to when you referred to "proper and adequate equipment?"

A. That's right. In other words, a piece of machinery that can't operate and produce is an inadequate piece of machinery.

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

Q. You were not referring to the crusher itself, then?

A. The crusher itself, plus the auxiliary equipment that was assisting it to produce the rock.

Mr. Monteleone: The two letters to which counsel referred, as I understand from his associate, were merely marked as exhibits, rather than being introduced in evidence, and at this time I am going to request that the letters be introduced in evidence and handed to the reporter, to become a part of the deposition of Mr. Basich or that of George Kovick.

Mr. McCall: No objection.

(A letter on the letterhead of Basich Brothers Construction Co., dated May 12, 1945, addressed to Duque & Frazzini, signed Basich Brothers Construction Co., by George W. Kovick, was marked by the Notary Public as "Defendants Ex. A to deposition of George W. Kovick. July 17, 1946. C. W. McClain, Notary Public," and is hereto annexed.)

(A letter on the letterhead of Basich Brothers Construction Co., dated May 12, 1945, addressed to Duque & Frazzini, signed Basich Brothers Construction Co., by George W. Kovick, was marked by the Notary Public as "Defendants Ex. B to deposition of George W. Kovick, July 17, 1946. C. W. McClain, Notary Public," and is hereto annexed.)

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Q. (By Mr. McCall): Mr. Kovick, did you receive a letter addressed to Basich Brothers Construction Company by Duque & Frazzini, dated May 19, 1945, in which they stated, in effect, that you had given instructions contrary to instructions they gave their men, and that the men followed your instructions?

Mr. Monteleone: At this time, out of fairness to the witness, I suggest that counsel hand the witness the letter he has in his hand, to which he is referring, so that the witness may refresh his memory from it.

Mr. McCall: May it be stipulated, then, that this is a copy of the original letter, Mr. Monteleone?

Mr. Monteleone: If you state that it is, I will take your word for it.

Mr. McCall: I have never seen the original, naturally.

Mr. Monteleone: I think we stipulated the same thing in the N. L. Basich deposition.

Mr. McCall: I am quite sure that is the record.

Mr. Monteleone: If that is the record, I will so stipulate.

Q. (By Mr. McCall): I will ask you if you remember receiving the original of that letter?

A. I recall receiving a letter similar to this. Whether it is an exact duplicate or not I wouldn't vouch for.

Q. Do you remember the incident mentioned in that letter, when, on Saturday, May 19th, Duque &

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

Frazzini issued orders that the Pioneer crushing plant be shut down at 9:30 a.m. until Monday morning at 7:30? Were you on the job at that time? A. Yes, sir.

Q. Who issued the order to shut the plant down?

A. Mr. Frazzini.

Q. Was he on the job at the time?

A. He was in the pit that morning.

Q. And both you and Mr. Albino were there?

A. No. I was not at the pit at the time he issued that order.

Q. What time did the order come to your attention?

A. Mr. Albino drove from the pit to the airport and notified me of Mr. Frazzini's decision.

Q. What time of day was that?

A. Oh, I presume it was about 10 o'clock.

Q. Do you remember that being Saturday?

A. No, sir, I don't recall whether it was Saturday or not.

Q. Did you then go with Mr. Albino to the pit?

A. Yes, sir.

Q. What time did you get to the pit?

A. I can't recall the exact hour we arrived at the pit. It was shortly after Mr. Albino notified me.

Mr. Monteleone: Mr. Kovick, you stated 10 o'clock. Was that 10 o'clock in the morning?

A. Yes.

Q. Had the Pioneer plant shut down already when you got there? A. Yes, sir.

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Q. Were the men gone? A. No, sir.

Q. Did you speak to Mr. Frazzini when you reached the job?

A. Mr. Frazzini left the job.

Q. He was not there when you arrived?

A. Was not there. So I instructed the men to stand by until I could contact Mr. Frazzini, so that, in case he changed his mind, we could still start the plant again without too great a loss of time.

Q. Did you contact Mr. Frazzini?

A. I did.

Q. What time was that?

A. I can't recall. It was in the same space of time after I returned to the pit.

Q. Did he come to the pit then?

A. No, he did not.

Q. Did you then give instructions to the men to continue work? A. Yes, sir.

Q. And they did continue work?

A. Yes, sir.

Q. When you contacted Mr. Frazzini what did you state to him and what did he say to you?

A. I stated to him that we were out of material at our batching plant, that unless that machine was kept running we would be forced to shut down before the shift was off.

Q. What did he say?

A. Mr. Frazzini stated that he didn't care what we had to do, that he was running the rock end

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

there, and when he would say to shut down, he could shut down.

Q. What did you tell him?

A. I told him I would continue running the plant until I could contact Mr. Basich.

Q. The men did stay on at work, then?

A. Yes, sir.

Q. Was that the first time that there was any conflict between Basich Brothers Construction Company and Duque & Frazzini as to who *what* authority to order the men to work or stop work?

A. Yes. We had requested that they work longer hours, on previous occasions, although if they didn't feel that they wanted to they could use their own judgment.

Mr. Monteleone: When you say "they," you mean whom?

A. Duque & Frazzini.

Q. (By Mr. McCall): The condition that you complained of in the letter of May 12th, 1945, had existed how long before May 12th?

A. Oh, I assume it existed during the month of April.

Q. Had it existed during the month of March?

A. To a very small degree.

Q. Had it existed during the month of February?

A. To a small degree, yes.

Q. What part of the complaint had existed during the months of February and March?

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

A. Well, there was very little in February, due to the fact that the main operations were setting up the plant, and in March, after the plant came under production, we offered suggestions on various methods of stepping up production, which were suggestions only.

Q. Was the subcontract bond in this case delivered to you in Arizona by Frazzini?

A. I believe so.

Q. Did you see Frazzini sign it?

A. I don't recall.

Q. Do you remember what date that was?

A. No, sir.

Q. Where were you when he handed it to you?

A. In my office in Tucson.

Q. What did you do with it?

A. Mailed it to our L. A. office.

Q. In Alhambra?

A. Yes, the Alhambra office.

Q. You don't remember what date that was?

A. No, sir.

Q. Do you remember the date that Duque & Frazzini did the last work on the subcontract or at the pit? A. No, sir.

Q. Did Basich Brothers Construction Company move a plant into the pit the latter part of May or about June 1st?

A. In that neighborhood, yes.

Q. And was that at the request of Duque & Frazzini?

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

A. Yes. We had a verbal agreement with Duque & Frazzini that they would rent this plant, and then they backed down on it.

Q. Who did the plant belong to?

A. PDOC, at Tucson.

Q. After they backed down on renting the plant did Basich Brothers Construction Company move it on the job?

A. PDOC moved it on the job at our request. PDOC set it up.

Q. What part of the pit was it set up in?

A. It was set up in the south pit, approximately 700 or 800 feet from Duque & Frazzini's home-constructed or job-constructed crusher.

Q. When did the PDOC plant start operating?

A. I can't recall the date.

Q. Did you use the same employees to operate that that he already had in the pit on other machinery? A. No, sir.

Q. You got new employes entirely?

A. PDOC furnished the crew. They operated it for so much a yard.

Q. Did Duque & Frazzini complain about your moving in this plant?

A. Other than that letter, the letter——

Q. How long after this PDOC plant started producing material before Duque & Frazzini left the job?

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

A. They started dismantling their equipment immediately afterwards.

Q. Were you there when they left?

A. Yes, sir.

Q. At the pit? A. Yes, sir.

Q. Did you immediately take over the job?

A. Yes. I had to.

Q. You took it over immediately after they left, and you were in charge of it until it was completed?

A. Yes, sir.

Q. You took over the same employes, workmen and machinery; is that right?

A. Yes, sir, other than a tractor belonging to Duque Frazzini and some of his employes that were working on these two plants he pulled down, and they left about that time.

Q. Do you remember when the last of the subcontract work was done? A. No, sir.

Q. There was no stoppage, then, of the subcontract work or the work in the pit between the time that Duque & Frazzini left the job and the time you took over for the Basich Brothers Construction Company?

Mr. Monteleone: I object to the phrase "you took over for Basich Brothers Construction Company," as a conclusion on the part of this witness. He can testify what actually transpired, but whether he took it over for Basich Brothers Construction Company or took it over for the benefit of Duque & Frazzini is a question of law, and not a question for

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

this witness to answer. I object to the form of the question.

Q. (By Mr. McCall): I will ask, you, Mr. Kovick, what time of day did Duque & Frazzini leave the job?

A. They didn't leave immediately after we began production. They were around the job for a week or approximately two weeks, but they were dismantling their equipment and making arrangements for shipping it out. They were in and out of the pit for a period of time after they ceased operations.

Q. Do you remember the day they ceased operations? A. No, sir.

Q. What record, if any, do you have or did you make that shows the line of demarcation, if any, between the time that Duque & Frazzini were there and the time after they had gone?

A. We kept a record, the same as we did previous to the time they left. There was a demarcation, due to the fact that they wrote us a letter and pulled off the job, and all work done after that was done, shall I say, under my immediate supervision, rather than theirs.

Q. Outside of that, there was no change in the way the records were kept? A. No, sir.

Q. You had charge of all the equipment which was rented by Basich Brothers to Duque & Frazzini, both fully operated and partly operated?

A. Yes, sir.

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Q. Who determined the difference between the equipment which was partly operated and that which was fully operated?

A. Duque & Frazzini and myself.

Q. How often did you hand in to the office, if at all, statements showing the machinery that was fully operated and that which was partly operated?

A. Every night.

Q. Then what did you mean by "equipment fully operated?"

A. Where we supply the machine, plus the operator, we supply the machine operator and the fuel and maintenance.

Q. And everything necessary towards the maintenance of the equipment? A. That's right.

Q. And then "partly operated" would mean when you furnish the machine, and what else?

A. As a rule they were fully operated or leased to them on a monthly basis, whereby they supplied the operator, the fuel and the maintenance of the machine.

Q. Then when you rented or leased from PDOC or someone else for Duque & Frazzini, on whose authority did you rent that equipment?

A. Mr. Frazzini's.

Q. What form did that authority take?

A. Verbal, as a rule. In most cases he arranged for the equipment, but due to the fact that he was a new contractor in Arizona they wouldn't extend him any credit. Therefore the equipment was

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

arranged for by him, but rented through Basich Brothers Construction Company, whereby the renter would be assured payment.

Q. Then you would say the lease of the equipment, the rent, is in the name of Basich Brothers Construction Company? A. Yes, sir.

Q. You stand good for the price?

A. Yes, sir. And——

Mr. Monteleone: Were you going to say something else?

The Witness: That was all.

Q. (By Mr. McCall): That was done in each and every case where machinery or equipment was rented from someone other than Basich Brothers Construction Company? A. That's right.

Q. Did you ever have any authority in writing from Frazzini or Duque to rent equipment?

A. No, sir.

Q. Did you ever have any authority in writing from Duque & Frazzini to rent equipment from Basich Brothers Construction Company?

A. No, sir, other than verbal orders requesting the machinery.

Q. Then who kept the time for the machinery that was rented and charged to Duque & Frazzini by Basich Brothers Construction Company?

A. As a rule, our operators and their foremen.

Mr. Monteleone: When you say "our," you mean Duque & Frazzini?

A. Duque & Frazzini foremen.

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Q. (By Mr. McCall): Was there a card kept on each piece of equipment that was fully operating? A. Yes, sir.

Q. And that card was issued by the foreman and the operator of the equipment?

A. In some cases it wasn't, because on all plants that were rented by the month we didn't require a daily report of time, due to the fact that it ran from one part of a month to the same part of the next month, and that constituted a month's rental.

Q. On the equipment that was not rented by the month, then, would the foreman and the operator sign a card each day?

A. That was the usual procedure.

Q. Then on equipment rented from PDOC or anyone else, where the equipment did not belong to your company, Basich Brothers Construction Company, did the foreman and the operator sign a card each day?

A. Generally the operator representing the other firm would request Duque & Frazzini's foreman to submit each and every daily time sheet to them.

Q. Did they okay each and every daily time sheet? A. I presume they did.

Q. Calling your attention to Article 10 of the alleged subcontract, which reads as follows: "In the event any controversies should arise, the contractor and the subcontractor each will elect a representative, and the representatives will in turn elect a third disinterested party, to settle contro-

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

versies. All decisions will be final." Were any controversies, during the course of the job, settled in this manner by Duque & Frazzini and Basich Brothers Construction Company?

Mr. Monteleone: I object to the question. There is no evidence that there were any controversies between them.

Mr. McCall: He can answer. He knows whether there were any controversies between them.

Mr. Monteleone: There were no controversies at all, as I understand from the evidence. If you indicate that there were any controversies, indicate what you are referring to, what particular controversy you are referring to. The question is general and broad, and from the evidence there is no indication that there were any controversies between the parties, or any dispute or misunderstanding between the parties.

Mr. McCall: I think the letter of May 12th, which reads, in part, "In spite of our verbal requests, letters and further requesting your Bonding Company representative to investigate conditions relating to your production of materials, we have received no improvement whatever on your material deliveries." I think that would—

Mr. Monteleone: There is no controversy about that fact. There was no divergence of opinion, as far as the parties involved were concerned, nothing to arbitrate.

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Q. (By Mr. McCall): I will ask you, Mr. Kovick, did you ever have any dispute or controversy with Duque & Frazzini regarding the production of material while they were on the alleged subcontract job?

A. I have had quite a number of discussions with them; you can't call them controversies, because in most cases they would agree to make the necessary improvements, and that is as far as it would go.

Q. But they never would make the necessary improvements—is that what you mean?

A. In certain cases they would, and in other cases they would just ignore my request, and, that being a subcontract, I would just have to let them do as they saw fit.

Mr. McCall: That is all the questions I can think of. Any questions, Mr. Monteleone?

Mr. Monteleone: Yes, I am going to ask a few questions.

Cross-Examination

By Mr. Monteleone:

Q. Mr. Kovick, you spoke of the records kept by Basich Brothers as to the quantity of material produced by Duque & Frazzini, and in your answer, if I understood you correctly, you said those records were determined by truck loads?

A. No. The quantities for Duque & Frazzini

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

were determined by the U. S. Engineering Department.

Q. I mean your own records?

A. Yes, sir.

Q. Did you have any records of any material that was produced by Duque & Frazzini and stockpiled, before they were removed by Basich Brothers and their trucks?

A. We had stockpile materials, yes.

Q. Did you have any records of the quantity of materials stockpiled, before they were loaded on your trucks and removed?

Mr. McCall: I object, as having been asked and answered.

Mr. Monteleone: No, I don't believe it has. If I understand correctly, there were a great many cases where Duque & Frazzini produced material which was stockpiled before it was taken up by Basich Brothers. Is that correct?

A. Yes, in some instances.

Q. You didn't have any records as to the quantity of material stockpiled, before it was loaded on your trucks, did you?

A. No. As a rule, we would try to estimate that and then count it out as we would remove it in the trucks and haul it to the grade. In other words, the stockpiling was done by Duque & Frazzini's trucks, and they would haul it from the crusher to the stockpile and dump it, and then, when we would

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

load it and haul out, we would check the loans with the records you were referring to, Basich Brothers' records.

Q. Were these records kept by Basich Brothers?

A. An employe of Basich Brothers.

Q. And records kept by Basich Brothers or any employe, are under your general supervision?

A. Yes, sir.

Q. And they were so kept, in the ordinary course of the job? A. Yes, sir.

Q. Both as to the quantities of material removed and as to the payroll of Duque & Frazzini, and as to the rental of equipment by Duque & Frazzini, were they all kept in the ordinary course of business?

A. We kept records on all of that, yes.

Q. From your experience and your knowledge of the contract and what you observed, would you state that those records correctly portray the actual condition as it existed? A. Yes, sir.

Q. And the rentals of the equipments were the fair rentals of equipments; is that correct?

A. Yes, sir.

Mr. McCall: I object to that as being irrelevant and immaterial, as to the fair rental of the equipment, and not sufficient foundation laid.

Q. (By Mr. Monteleone): Would you state that those equipments were actually used by Duque & Frazzini? A. Yes, sir.

Q. And would you state that the payroll of the

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

men, as indicated by your records, as you have testified, truly reflects the employment by Duque & Frazzini on this particular job?

A. Yes, they do. May I add one more thing, off the record?

Mr. Monteleone: This is off the record.

(There was a discussion off the record.)

Q. (By Mr. Monteleone): As far as the rentals of equipment were concerned, the rentals were based upon what?

A. In certain instances they were based by the month, or by the hour, or by the yard.

Q. Were the rates fixed by the O.P.A.?

A. The rates were fixed by the O.P.A.

Q. And those rates fixed by the O.P.A. were the rates reflected in your records; is that right?

A. Yes, sir.

Q. Were the records of the time of operation of the plant and shut-downs kept in the ordinary course of business and under your general supervision?

A. Yes, sir, the same as any other job.

Q. Counsel asked you a question as to whether or not you had taken over the job after Duque & Frazzini shut down the early part of June, 1945, and you gave an answer that you had to take over the job at that time. What did you mean by that?

A. I had to take over the production of materials at that time.

Q. Why was that?

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

A. So as to keep our job in operation, the entire job, the entire project.

Q. That was a defense job or project?

A. Yes.

Q. What was the name of that job?

A. It was a B-29 training base.

Q. Was that B-29 training base—

A. A B-29 bomber squadron training base.

Q. Were you instructed by any representative of the United States Government to see that work was not shut down?

A. I was constantly reminded of that by the Government, its representatives.

Q. When you state you had to take over the job, you had to take it over because it was abandoned by Duque & Frazzini; is that correct?

A. Yes.

Q. And you had to do that in order to continue the construction of this important war project; isn't that true?

A. Yes, sir.

Mr. Monteleone: That is all.

Redirect Examination

By Mr. McCall:

Q. Mr. Kovick, in answer to a question of Mr. Monteleone's, you stated you were constantly reminded by the Government and its representatives. What do you mean by "the Government and its representatives"?

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

A. The U. S. Engineering Department and its representative, the resident engineer on the project, and the Colonel in charge of the air port.

Q. What did they remind you of?

A. That we had a schedule to meet, that our operations could not at any time interfere with their training program.

Q. And that is the reason that you took over immediately after Duque & Frazzini left, and completed it?

A. Yes, sir; otherwise I could have waited six months until the thing was settled.

Mr. McCall: That is all.

Recross-Examination

By Mr. Monteleone:

Q. Did Duque & Frazzini ever request that any of these matters be determined by arbitration?

A. No, sir.

Mr. Monteleone: That is all.

The Witness: You are speaking of me personally?

Mr. Monteleone: Yes.

The Witness: Yes. I wouldn't know whether they requested the company. They didn't request me

Redirect Examination

By Mr. McCall:

Q. Was there ever a time when Basich Brothers ever suggested to Duque & Frazzini the arbitrating of their differences?

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Mr. Monteleone: There is no evidence that there were any matters subject to controversy.

Mr. McCall: You raised the point, Mr. Monteleone.

A. To my knowledge there wasn't.

Q. (By Mr. McCall): As I understand, all the equipment which you have charged to Duque & Frazzini, both owned by Basich Brothers and owned by others, was charged out by your office on the O.P.A. schedule only? A. Yes, sir, or less.

Q. Whether it be fully operated or partly operated?

A. Under their set schedule, for all purposes.

Q. Who do you mean by "their"?

A. The O.P.A.

Q. And you followed those schedules?

A. Yes, sir.

Q. In all cases? A. In all cases.

Mr. McCall: Thank you.

Mr. Monteleone: This witness is leaving for Fresno tonight, and I don't know when he will be back. Do you have any idea when you are coming back?

The Witness: I haven't the slightest idea.

Mr. Monteleone: Can the original deposition be sent to Fresno and be signed before some duly authorized officer there? Are you willing to stipulate, Mr. McCall, that the deposition may be read and corrected by the witness and signed before

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

some notary public in the County of Fresno, in order to accommodate the witness?

Mr. McCall: Yes. And the notary before whom it is signed will be requested to send it direct to Mr. McClain for filing.

Mr. Monteleone: That is correct. May the record also show that, in referring to a "Bonding Company representative" in his letter, that I am referring to the latter dated May 12, 1945? I am going to ask this witness this particular question.

Recross-Examination

By Mr. Monteleone:

Q. Did you yourself interview any bonding company representative? A. On the project, yes.

Q. Who was the man? A. Mr. Bray.

Q. Do you recall when you saw him at the project? A. No, I can't recall the date.

Q. Do you know whether you saw him on more than one occasion? A. Yes.

Q. On how many different occasions?

A. I wouldn't know the number of occasions, but he was down there several times.

Q. Was he there during the month of May, would you state? A. I believe he was.

Q. And was he there during the month of June, 1945? A. I don't recall.

Q. Well, he had been there on occasions following the 5th day of April, 1945? A. Yes, sir.

Q. Did he ever tell you that the company had

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

never been notified of any of the conditions existing at the plant? Did he ever make any objections of that kind to you, that you know of?

A. Yes, we had a discussion on that order.

Q. What is that?

A. I say we had a discussion on that order.

Q. What discussion did you have?

A. Well, relative to the type and condition of plants.

Q. Did he tell you whether or not he would use his good offices to try to rectify that condition?

A. Yes, sir.

Q. What did he say in that respect?

Mr. McCall: I object to that as a leading question, and as irrelevant and immaterial.

Mr. Monteleone: It is not. It bears on the waiver.

Q. (By Mr. Monteleone): What did he state in that respect, do you recall?

A. We covered so many subjects that I don't recall any specific statement.

Q. State generally what was said by Mr. Bray, the representative of the bonding company.

A. The general improvement of the equipment and workmanship of Duque & Frazzini, to bring up the production the required amount.

Q. Do you recall when those statements were made? A. No, sir.

Mr. Monteleone: Mr. McCall, have you any ob-

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

jection if I take the deposition of Mr. Bray within the near future?

Mr. McCall: None at all.

Mr. Monteleone: May I notify you, then, when that will be done?

Mr. McCall: All right. One more question.

Redirect Examination

By Mr. McCall:

Q. Mr. Kovick, you say that Mr. Bray was on the job at Tucson several times while you were there?

A. Yes, sir.

Q. Would you say he was there more than twice?

A. I wouldn't swear to it.

Q. By "several" what do you have reference to?

A. Two, or possibly more, but I am sure it was two times.

Q. Where was this conversation between you and Mr. Bray at the time he indicated or said that he would do something about bringing up the production of Duque & Frazzini?

A. In Basich Brothers' field office at Tucson.

Q. Did I understand you correctly to state that he told you that he would do something to bring up the production?

A. We were speaking of generalities, and he said he would use his good offices to improve conditions.

Q. Did he say what conditions he had reference to?

A. No. The conditions we all had reference to

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

was the lack of sufficient material to keep our project in operation.

Q. What time was it that you first talked to him about it?

A. On his first trip down there.

Q. Was that in February, March or April or——

A. I don't recall the date.

Q. But he stated that he would use his good offices in getting them to bring up the production?

A. Yes, sir.

Q. Did you tell him what the production was at that time? A. Yes, sir.

Q. What was it?

A. We went all through the records. I don't recall at the moment, but we had all the records at the office at the time, and we went over the day by day records, and then we also checked with our office engineer relative to the daily quantities and estimates up to that date.

Q. That was on what trip?

A. If I recall, that was on the first trip.

Q. Did you go with him to the pit?

A. Yes, sir.

Q. Did you have a further discussion at the pit?

A. Yes. I took him out to the pit and showed him all the equipment.

Q. What did he do, if anything, in using his good offices to bring up the production?

A. I didn't see any outward improvement.

Q. Did he tell you anything else?

A. Not that I can remember at the moment.

Plaintiff's Exhibit No. 22—(Continued)

(Deposition of George W. Kovick.)

Q. Then he was down there another time?

A. Yes, sir.

Q. Did you talk to him at that time about improvement?

A. I talked to him both times he was there, yes.

Q. That was the time that I was with him, was it not?

A. Yes, I believe so.

Q. All the talking you did to him at that time was when we were all three together, wasn't it, together with Mr. Monteleone and Mr. Basich?

A. Yes, sir.

Mr. McCall: That is all.

Recross-Examination

By Mr. Monteleone:

Q. On the first occasion Mr. Bray visited the pit and was going over your records, was Mr. N. L. Basich along also, do you recall?

A. I don't recall.

Q. How much time did he spend in your office going over the records?

A. Oh, I would judge he spent a good part of one afternoon.

Q. Did you have available to him at that time the payroll records of Duque & Frazzini?

A. All records.

Q. Including the rental records of equipment?

A. They weren't up to date, but we requested that our office manager prepare all Duque & Frazzini charges up to the close of that period for Mr. Bray.

Plaintiff's Exhibit No. 22—(Continued)
(Deposition of George W. Kovick.)

Q. Were they exhibited to Mr. Bray?

A. Yes, sir, at a later date.

Q. Were also the amount of production or amount earned by Duque & Frazzini records shown to Mr. Bray? A. Yes, sir.

Q. By yourself?

A. All records were open to Mr. Bray.

Mr. Monteleone: That is all.

Mr. McCall: Nothing further.

Q. (By Mr. Monteleone): Did Mr. Bray make any objection as to the records?

A. No, sir.

Q. Or question any of the records?

A. No, sir.

Mr. Monteleone: That is all.

Mr. McCall: Thank you, Mr. Kovick.

GEORGE W. KOVICK.

Subscribed and sworn to before me this 6th day of August, 1946.

[Seal] CECILE R. GEARHART,
Notary Public in and for the County of Fresno,
State of California.

State of California,
County of Los Angeles—ss.

I, C. W. McClain, a Notary Public within and for the county and state aforesaid, duly commissioned and qualified, authorized to administer oaths and to take and certify depositions, do hereby certify that

Plaintiff's Exhibit No. 22—(Continued)

the witness named in the foregoing deposition, to-wit, George W. Kovick, was by me first duly sworn to testify the truth, the whole truth and nothing but the truth, before the commencement of his deposition; that said deposition was taken pursuant to the annexed Stipulation to Take Deposition, at the time and place set forth therein and in the title page hereof, and was completed on the same day.

I further certify that the testimony given by the said witness was by me reduced to writing in the presence of the witness by means of shorthand; that the said shorthand notes were subsequently transcribed in the absence of the witness; that it was stipulated by and between counsel for the respective parties that the original transcript of the said deposition may be sent to the witness for reading, correction, if necessary, and signing before any Notary Public in and for Fresno County, California, at his address in that city, to-wit, 145 West Shields Avenue, and that, after signing the said deposition, the same will be returned to me for filing.

I further certify that I am not a relative or employe or attorney or counsel of any of the parties, or a relative or employe of such attorney or counsel, or financially interested in this action.

In Witness Whereof, I have hereunto set my hand and affixed my seal, at Los Angeles, California, this 24th day of July, 1946.

[Seal] /s/ C. W. McCLAIN,

Notary Public in and for the County of Los Angeles,
State of California.

Plaintiff's Exhibit No. 22—(Continued)

DEFENDANTS' EXHIBIT A

to Deposition of George W. Kovick

[Letterhead Basich Brothers Construction Co.]

P. O. Box 5416
Tucson, Arizona
May 12, 1945

Duque & Frazzini
P. O. Box 5416
Tucson, Arizona

Gentlemen,

In your letter of May 8, 1945 you state you desire to start a night shift to produce additional base materials. Since you lack proper and adequate equipment to operate even on a single shift basis without breakdowns, we suggest that any materials made on a night shift be placed in stockpile from which we will reload at our expense.

The above statement regarding lack of proper equipment can be verified from our daily production records of rock base deliveries from your plant.

Yours very truly

BASICH BROTHERS
CONSTRUCTION CO

By /s/ G. W. KOVICK,
Supt.

GWK/ht

Plaintiff's Exhibit No. 22—(Continued)

DEFENDANTS' EXHIBIT B

to Deposition of George W. Kovick

[Letterhead Basich Brothers Construction Co.]

P. O. Box 5416
Tucson, Arizona
May 12, 1945

Duque & Frazzini
P. O. Box 5416
Tucson, Arizona

Gentlemen,

In spite of our verbal requests, letters and further requesting your Bonding Company representative to investigate conditions relating to your production of materials, we have received no improvement whatever on your material deliveries.

We have shut down our Concrete Paving operations due to lack of rock base subgrade. All standby charges resulting from this lay off will be charged to your account.

BASICH BROTHERS
CONSTRUCTION CO

By /s/ G. W. KOVICK,
Supt.

GWK/ht

[Endorsed]: Filed U.S.C.C.A. July 18, 1947.

PLAINTIFF'S EXHIBIT No. 23

In the District Court of the United States for the
Southern District of California, Central Division

No. 5021-P.H.

BASICH BROTHERS CONSTRUCTION COM-
PANY, a corporation,

Plaintiff,

vs.

GLENS FALLS INDEMNITY COMPANY, a
corporation, et al.,

Defendants.

DEPOSITION OF JOHN H. BRAY

The deposition of John H. Bray, a witness produced on behalf of the plaintiff was taken before Charles G. Murray, a Notary Public in and for the County of Los Angeles, State of California on Wednesday, the 4th day of September, 1946, commencing at the hour of 2:00 o'clock P. M. at Room 926 Rowan Building, Los Angeles, California, pursuant to oral stipulation of counsel as hereinafter set forth.

Appearances:

For the plaintiff, Stephen Monteleone, Esq., 1050 Petroleum Bldg., Los Angeles, California.

For the defendant, John E. McCall, Esq., 926 Rowan Building, Los Angeles, California.

Plaintiff's Exhibit No. 23—(Continued)

Mr. Monteleone: It is orally stipulated, by and between the plaintiff, through its attorney, Stephen Monteleone and the defendants Glens Falls Indemnity Company, et al, through their attorney, John E. McCall, that the deposition of the witness John H. Bray may be taken before Charles G. Murray, a Notary Public in and for the County of Los Angeles, State of California, on the 4th day of September, 1946, at the hour of 2:00 o'clock P. M., at Room 926 Rowan Building, Los Angeles, California, pursuant to the terms and provisions of rules 26 and 32 of this court.

Mr. McCall: It is so stipulated.

JOHN H. BRAY,

a witness produced on behalf of the plaintiff, having been by the Notary Public first duly sworn to testify the truth, the whole truth and nothing but the truth, on oath testified as follows:

Cross Examination

By Mr. Monteleone:

Q. Your full name is what?

A. John H. Bray.

Q. What is your residence address, Mr. Bray?

A. 2052 Midlothian Drive, Altadena.

Q. What is your telephone number there?

A. Sycamore 45758.

Q. What is your business address, Mr. Bray?

A. 548 South Spring Street.

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

Q. Do you have a telephone number there?

A. Yes, sir.

Q. What is that telephone number?

A. Michigan 1171.

Q. What is your business or occupation?

A. Claims Manager of the Los Angeles office of the Glens Falls Indemnity Company.

Q. What is your duty or what are your duties in connection with that office?

A. To examine and adjust the claims arising out of bonds or policies against the Glens Falls Indemnity Company.

Q. Is there any other officer in the office?

A. Yes.

Q. Who is that other officer?

A. James S. Henry.

Q. Who is Marvin S. Jonas?

A. He is a Surety Underwriter—a special agent.

Q. Were you occupying this same position in 1945 with the Glens Falls Indemnity Company—the same position as you are today? A. Yes.

Q. What, if any additional hours or duties did you have then that you do not have today?

A. None.

Q. Are you familiar with the bond that was executed by the Glens Falls Indemnity Company as surety for Duque and Frazzini, as principals, in favor of Basich Brothers Construction Company?

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Mr. McCall: I object to that as calling for a conclusion of the witness and as being too broad in its scope.

Mr. Monteleone: He says that he is familiar with it. A. I did not say that.

Q. (By Mr. Monteleone): Well you know that such a bond existed, do you not?

A. I reviewed what purported to be a copy of such bond.

Q. Did the copy of the bond which you reviewed in any way correspond with the bond which I now exhibit to you on the stationery of the Glens Falls Indemnity Company, bearing date—entitled “Sub-contract Bond”, bearing date the 20th day of February, 1945?

A. Well, I haven't time to read all of it but it looks like the same bond.

Q. When did you first see the copy of this bond?

A. Well, that would be hard to say but it was probably three or four weeks after I made my first trip to Tucson, which was in the latter part of April, 1945.

Q. In other words, you had not seen the bond previous to that time? A. That is correct.

Q. Now, did you have any information given to you prior to that time that such bond had been executed by the Glens Falls Indemnity Company?

A. I saw the report of the execution which was just a skeleton form—what we call a Daily Report.

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

Q. Where did you see that? A. Where?

Q. Well, when did you see it?

A. I saw it some time previous to April 21, 1945.

Q. Can you fix approximately when it was?

A. Well, I imagine around about the middle of April.

Q. Of April, 1945? A. That is right.

Q. Can you tell me whether or not this bond was executed by the Los Angeles local office of the Glens Falls Indemnity Company?

A. Well, I imagine that the Notary Public's seal will determine that.

Q. Well, we will look at the Notary's seal which shows that the bond was notarized in the County of Los Angeles.

A. Well, if it was signed by Mr. Jonas and was notarized here, it was undoubtedly signed in Los Angeles.

Q. Did you know Duque and Frazzini prior to the 20th day of February, 1945? A. I did not.

Q. Do you know whether or not any investigation or examination had been made by the Glens Falls Indemnity Company as to the financial responsibility or efficiency of Duque and Frazzini, so far as equipment was concerned, to carry on any contract such as that involved in the contract involved here? A. I do not.

Q. Have you seen any report of the Glens Falls Indemnity Company which would indicate whether or not an investigation had been made as to the

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

financial responsibility of Duque and Frazzini or the ability of Duque and Frazzini to perform the contract that existed between Basich Brothers and Duque and Frazzini? A. I have not.

Q. Have you ever made any inquiry to ascertain whether or not there was such an investigation made as to the ability or as to the bond itself?

A. I have not.

Q. Can you state whether or not, from your knowledge of the records and the investigation and reports, the Glens Falls Indemnity Company had acquired any security from Duque and Frazzini, or anyone else, for Duque and Frazzini to secure the Glens Falls Indemnity Company in the event of loss under this bond?

A. I have seen no such report.

Q. What was that answer?

A. I have seen no such report.

Q. Do you know whether or not such is the fact: That the Glens Falls Indemnity Company does hold securities belonging to Duque and Frazzini to insure the Glens Falls Indemnity Company against any loss under this bond? A. I do not.

Q. Can you state whether or not such a collateral does exist? A. I don't know.

Mr. McCall: I can get that information for you and give it to you. I would be glad to do so.

Mr. Monteleone: Thank you. I will appreciate that.

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

Q. (By Mr. Monteleone): When did you first learn of the contents of the contract bearing date February 7, 1945 that was executed by Basich Brothers Construction Company as one party and Duque and Frazzini as the other party?

A. About the second or third day after I arrived in Tucson, in April of 1945.

Q. Where was that copy at that time?

A. I saw the copy that Duque and Frazzini had in their possession.

Q. Was that the first time that you learned of the contents of that contract?

A. That is right.

Q. Do you know whether or not there was a copy of that contract in the office of the Glens Falls Indemnity Company?

A. In Los Angeles?

Q. In Los Angeles or at any other place.

A. I rather suspect that there was one in the San Francisco office. I have no definite knowledge of it, but I rather think it was because I was sent a copy of it later.

Q. What was the reason it was in the San Francisco office rather than the Los Angeles office?

A. That is just a procedure. We keep only skeleton copies in this office.

Q. Do you know whether or not the bond was made by Duque and Frazzini in the Los Angeles office or in the San Francisco office?

A. I don't know.

Q. Do you know when Duque and Frazzini made

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

application for this bond? A. I don't know.

Q. Who would have that information?

A. That I couldn't tell you for sure but I rather suspect that would be in San Francisco. It would probably be in the possession of the Bond Department there.

Q. Are you familiar with, or have you ever examined the contents of the contract between Basich Brothers Construction Company on the one hand and the United States of America, through the War Department, dated January 25, 1945, with reference to the construction of the Davis-Monthan Air Field? A. I have never seen that.

Q. Have you ever sought to acquire information as to the contents of this contract?

A. No, I have not. The only thing I have learned is that there was such a contract and as to the portions of it contained in the contract bond between Basich Brothers Construction Company and Duque and Frazzini.

Q. When you first began making an investigation of this matter, was it under some one's direction? A. I believe so.

Q. Under whose instruction or direction was it that you began making such investigation?

A. Well, as I recall it, Mr. Basich addressed a letter to Duque and Frazzini and sent a copy to us, and on receipt of the letter to Los Angeles, we immediately sent it to San Francisco and, along about the 15th or 16th of April, they wrote to me

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

and told me they would like to have me conduct—that they would like to have me contact Mr. Basich.

Q. That letter was addressed to the Los Angeles office, is that right? A. Yes.

Q. That letter bore the date of April 5, 1945, is that correct? A. I think so.

Q. Would you like to see a copy of it, or are you familiar with that letter?

A. I have seen it.

Q. That was sent to your office by registered mail, wasn't it?

A. I am not certain of that. It was received in the office by mail. I don't remember whether it was sent by registered mail, but it was received and sent on.

Q. Before it was sent to you, did you make an effort to contact Basich Brothers Construction Company or any one connected with Basich Brothers Construction Company?

A. I don't know. I don't think so.

Q. Did you, or any one, ever receive a copy of that letter dated April 5, 1945?

A. I don't know whether it was addressed to us, or not. I did not receive it, myself.

Q. From all of the records of the company and all of the investigations that you have made on the part of the company, up to this time, have you seen any copy of acknowledgement of that letter received from Basich Construction Company?

A. I don't recall that I have.

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Q. How long was that letter retained in your local office, here, before it was forwarded to your San Francisco office?

A. I don't know but I rather suspect it went up——

Mr. McCall (interrupting): Not what you suspect—just what you know. A. I don't know.

Q. (By Mr. Monteleone): Well, what would be your estimate as to the approximate time?

A. I would have to guess at that.

Q. No, just what you know.

A. I would say within two or three days.

Q. In other words, you retained it in your office for two or three days?

A. I have no independent recollection of it but it may have been forwarded on the same day.

Q. Do you know whether or not any effort was made or anything was done by any one on the part of the Glens Falls Indemnity Company to investigate the contents of that letter of April 5, 1945?

A. I have no knowledge as to that, no. Nothing was done through our office.

Q. Do you recall approximately how long it was after the letter had been sent to San Francisco office before it was sent back to the Los Angeles office?

A. The letter was not returned. I got another letter from San Francisco.

Q. Was that a letter of instruction?

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

A. It was a letter instructing me to contact Mr. Basich.

Q. Was a copy of the letter of April 5, 1945, retained in your office?

A. I don't think it was. I think I wrote for a copy of the letter later. That is something I have no recollection of now.

Q. You think you had written a letter for a copy. Have you any recollection as to how long it was after that that you wrote for a copy of the letter?

A. I would estimate that it was around the latter part of April or the first part of May.

Q. Can you state about when it was that you received this reply from the San Francisco office?

A. The first reply?

Q. Yes, the first reply after they had received that letter.

A. I think that letter arrived—May I refer to a calendar?

Q. Yes.

A. I think I can tell you within a day or so—Well, I would estimate probably the 17th or 18th of April it was that I received this letter.

Q. Do you have any record or diary in your possession which would show as to when the letter was forwarded to the San Francisco office?

A. I doubt that because, ordinarily, we do not write letters of transmittal of these matters.

Q. When that letter was sent to the San Fran-

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

cisco office, was it sent with any notation from any one in your office as to what should be done?

A. No.

Q. Did you ascertain as to any contents of the letter sent to the San Francisco office—the letter bearing date April 5, 1945? A. No.

Q. Now, from the time you sent that letter to San Francisco, until the time you got this reply from San Francisco, some time later on, did you make any contact with Basich Brothers Construction Company? A. No.

Q. Did you, during that period of time, make any contact with Duque and Frazzini?

A. No.

Q. Did you know that Duque and Frazzini were working in Tucson, Arizona at this time, on that job?

A. I think I knew something about it. I think I knew that there was such a job and I think I probably checked it at the time the letter came in.

Q. You knew the address of Duque and Frazzini, then?

A. I did not know their address.

Q. You knew that they were working at Tucson?

A. I understood they were, yes.

Q. Did you make any effort to ascertain the address of Duque and Frazzini from the time you forwarded the letter to San Francisco until you got your instructions from San Francisco, later on?

A. No.

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

Q. Can you state what, if any instructions were given to you by San Francisco?

Mr. McCall: I object to that on the grounds that it is incompetent, irrelevant and immaterial as to what instructions may or may not have been given to him by his San Francisco office.

Mr. Monteleone: Do you instruct the witness not to answer or do you merely make your objection?

Mr. McCall: Well, if he has any answer, he can make it.

A. We got a letter from San Francisco instructing me to contact Basich Bros. Construction Co. and investigate and find out what the trouble was.

Q. (By Mr. Monteleone): At the time you received the copy of this letter of April 5, 1945, you knew, did you not, that under the contract, Duque and Frazzini had—that pursuant to the contract of February, 1945, Duque and Frazzini were to install two plants, each with the capacity of producing 800 cubic yards of material per day?

A. I had no such knowledge.

Q. Well, the letter, itself, conveyed that information didn't it?

A. I have no recollection of the letter.

Q. Look at that letter.

A. This letter speaks for itself. It says that it is agreed that you are to get two plants, each capable of producing 800 cubic yards per day. There is no question about that.

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Q. When you first acquired knowledge that Duque and Frazzini had not established two plants capable of producing 800 cubic yards of material a day, what was your action in regard to contacting Duque and Frazzini on that knowledge?

Mr. McCall: That is objected to on the grounds that it is incompetent, irrelevant and immaterial as he has not stated that he had any connection or made any action in that regard. Your question presumes that he got facts that he could rely upon.

A. I do not recall as to that. I had not seen that letter, naturally.

Q. (By Mr. Monteleone): You had seen it while in your possession?

A. Yes, but I had not read it carefully.

Q. Did you know that under the contract that Duque and Frazzini had with Basich Brothers Construction Company they were to establish two plants capable of producing 800 cubic yards of material per day?

A. I do not recall anything about such a statement in the letter. I do not recall that.

Q. Did you in any way contact the Basich Brothers Construction Company before you got that letter from San Francisco? A. No.

Q. When you ascertained the contents of the letter dated April 5, 1945, that Duque and Frazzini did not commence to operate the plant on February 19, 1945, did you in any way contact Basich Broth-

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

ers Construction Company to ascertain what the situation was before you received instructions from San Francisco?

Mr. McCall: Just a minute. Will you please read that question?

(The question is repeated by the Notary Public.)

A. No.

Q. (By Mr. Monteleone): Now, what was the first thing you did after receiving instructions from your San Francisco office?

A. I contacted Mr. Basich. I believe I telephoned and made an appointment to see him.

Q. Which Mr. Basich was that?

A. Nick Basich.

Q. Did you see him after that?

A. I did.

Q. Where did you see him?

A. At his office.

Q. Who was present at that time?

A. Just Mr. Basich and myself.

Q. Can you fix the time you saw him on that occasion?

A. Do you mean the time of the day or the date?

Q. The day.

A. I would say it was probably April 18th or 19th.

Q. Of what month? A. Of April.

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Q. What, if anything was said by you and Mr. Basich on that occasion?

A. Well, I asked Mr. Basich and told him that I had been requested to make an investigation by my San Francisco office and asked him what the situation was over there. He told me that Duque and Frazzini had encountered a lot of technical difficulties and that the engineering set-up in some respects was not correct. I asked Mr. Basich about the prices on the job and he told me that he thought the price was adequate. I asked him—This was a long time ago and it is hard to remember exactly—Mr. Basich told me that he thought they should—that he thought, though, that if Duque and Frazzini would get a proper engineering set-up and proper organization, that any money they had lost up to that time on the job would be the entire loss they would have and that they possibly had a chance of working out without any loss, or at least without any loss from then on, out. But he did not know what loss they had sustained as he did not know what outstanding bills there were, but he assumed that they had lost some money up until that time. He requested that we have some one look into the situation at Tucson or that he thought that would be a good idea; and I later on contacted my San Francisco office, as I recall.

Q. Before we get to that, let us finish the conversation.

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

A. That was about the extent of the conversation.

Q. Before you went to see Mr. Basich, did you have in your possession a copy of the Basich and Duque and Frazzini contract? A. No.

Q. Had you seen a copy of that contract before going to see Mr. Basich? A. No.

Q. Did you know what the contents of that contract were? A. No.

Q. Had your San Francisco office, up to that time, told you what the contents of the contract were?

A. At the most, just what the amount was, nothing special.

Q. Had your San Francisco office, up to that time, furnished you with the information that the contract was to be commenced on or about February 19, 1945, and was to be completed on or before June 3, 1945?

A. I don't recall such information.

Q. Did you receive any information at that time? A. No.

Q. Did you receive any other information up until you called on Mr. Basich to the effect that Duque and Frazzini were to construct two plants, each to be capable of producing 800 cubic feet of material under the contract?

A. No. I may have known that at some time, but I do not recall.

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

Q. When you contacted Mr. Basich on this occasion, after you had read the letter of April 5, 1945, did you discuss with Mr. Basich the matter as to when Duque and Frazzini actually commenced operation under this contract?

A. No, I don't believe I ever did.

Q. Did you discuss with Mr. Basich anything about the fact that Duque and Frazzini were not averaging 800 cubic yards of material per day per plant?

A. I don't recall as to the details but he stated they were not keeping up with the production necessary to keep him going.

Q. I did not ask you that, but did you after receiving information as to the contents of the letter of April 5, 1945, discuss with Mr. Basich the fact that Duque and Frazzini were not averaging 800 cubic yards per day on each plant?

A. I don't recall that now.

Q. Did you get information from Mr. Basich to the effect that their plants were not capable of producing that amount of material?

A. I don't think he said that. I think he said that the engineering set-up was not capable of producing that material but I don't recall his words.

Q. After you had this conversation did you contact your assured, Duque and Frazzini?

A. Yes, I went over to Tucson. I went that week—on Saturday night.

Q. Could you fix the time you went to Tucson?

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

A. I think I left here on the night of the 21st of April.

Q. Did you see Mr. Duque and Mr. Frazzini on that particular trip? A. Yes, I did.

Q. When you saw Mr. Basich at his office, isn't it true that an arrangement was made to meet Mr. Basich on the particular day when you got to Tucson?

A. Well, I told him I would contact him there when I got there. I did not do that in the conversation but on the phone—by a phone call, I think, that same day or the following day.

Q. You telephoned him at that time that you would meet him, after you decided to go to Tucson?

A. I didn't know at the time I was in his office if I would go to Tucson, but I telephoned him later and told him that I would.

Q. At the time you called on Mr. Basich, did you ascertain the contents of the bond executed by the Glens Falls Indemnity Company for Duque and Frazzini?

A. I had not seen a copy of the bond.

Q. Did the San Francisco office furnish you a copy of the bond at that time? A. No.

Q. Did the San Francisco office furnish you with information as to the contents of the bond at that time?

A. Only to the effect that it was a contract bond.

Q. Did you have, or do you have any records in your Los Angeles office which would give you

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

any particulars as to the terms of the bond at the time you went to see Mr. Basich on this occasion?

A. No.

Q. Now, as I understand it, the purpose of—if I am wrong you may so state—that the purpose in making this trip to Tucson was to investigate the complaint made by the Basich Brothers Construction Company as set forth in their letter of April 5, 1945, and what transpired between you and Mr. Basich at the office, is that right?

A. It was just to investigate the situation.

Q. At the time you got to Tucson, how long did you remain there?

A. About three or four days.

Q. Did you telephone to Duque and Frazzini prior to the time of going to Tucson?

A. No.

Q. Now, when you got to Tucson whom did you see there?

A. Well, when I got there it was Sunday and I tried to call Mr. Basich and could not reach him. Then I tried to call Duque and Frazzini and could not reach them. I think I finally reached Mr. Basich at his hotel on Sunday evening.

Q. You did see Mr. Basich, did you?

A. Yes.

Q. And you and he took a trip down to the pit?

A. Well, Mr. Basich, as I recall, told me to come

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

by the hotel and he would drive me to the job; and we had breakfast there and he let me off at the pit where they were operating.

Q. Were you given full authority by your San Francisco office or by the Company to carry on this investigation.

A. I was requested to investigate the situation.

Q. And were you required to make a report as to the result of your investigation?

A. I did, later. That was assumed.

Q. Well, you were in Tucson on Sunday and Monday—you say three or four days?

A. Yes.

Q. And while you were in Tucson did you and Mr. Basich make a trip to the pit where Duque and Frazzini were operating?

A. I don't recall that. I was there one time but, as I recall it, that was the time you were there with us.

Q. In other words, you would not state whether you did or did not?

A. No, my statement that I went to the pit with him was indefinite. I don't remember.

Q. While you were in Tucson, did you have occasion to meet either Mr. Duque or Mr. Frazzini?

A. Oh, yes.

Q. Did you have any conversation with them at that time? A. Oh, yes.

Q. Did you at any time, while there, see the contract they had—the contract between Basich

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Brothers Construction Company and Duque and Frazzini? A. Oh, yes.

Q. Did you at that time see a copy of the bond which was issued by the Glens Falls Indemnity Company? A. I don't believe that I did.

Q. At the time you were in Tucson, had you acquired information, or been furnished with information as to the terms of the bond?

A. Nothing definite. I have a general knowledge of what is in most of such contract bonds.

Q. Now, while you were in Tucson did you ask Duque and Frazzini as to when they commenced operation on this job?

A. I believe I asked but they could not tell me.

Q. Did you ask to examine their records to determine that?

A. I asked to examine their records, but I don't believe they had any records.

Q. Did you go to their office to ascertain that?

A. Oh, yes.

Q. Their office was at the pit, wasn't it?

A. Oh, yes.

Q. Then you did go there?

A. Yes, but I thought you asked me if I went there with Mr. Basich.

Q. How many times did you go to the operation?

A. Two or three times.

Q. How long did you stay on each occasion?

A. I was there on Monday, Tuesday and Wednesday, as I recall. I went with Mr. Basich

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

rather early in the morning—I think about seven or seven thirty.

Q. You went with Mr. Basich to the work?

A. To the job. He let me off at Duque and Frazzini's office.

Q. Then you did go to Duque and Frazzini's office with Mr. Basich?

A. Yes, he was my chauffer.

Q. How long did you stay at the pit on that occasion?

A. Mr. Basich said that he would come and pick me up around noon, or have some one come and pick me up and wanted me to go and have lunch with him.

Q. Did he come and pick you up?

A. Mr. Kovick came over and picked me up later.

Q. How long did you stay there?

A. Two or three hours.

Q. While you were there did you examine the records of Duque and Frazzini?

A. Yes, such as they had.

Q. Did those records show the amount of material they had handled while in operation?

A. No.

Q. Did they have any records of that?

A. No.

Q. Did they have any records of what their labor bills were?

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

A. I think they had a copy of some of the pay-rolls but they were not full and complete.

Q. Was there any record of rental they had paid on any equipment?

Mr. McCall: You mean, did they show him any record?

Mr. Monteleone: That is right.

A. They showed me a record of the bills they owed to supply houses.

Q. Did they show you all of the records they had? A. They showed me what they had.

Q. They did not refuse to show you any records that they had, did they? A. No.

Q. What records did they show you?

A. I was interested in finding out what bills they had outstanding and Mr. Duque took me around and showed me the operations.

Q. While you were there, did you find out what bills they had outstanding? A. Yes.

Q. Did you discuss with them the efficiency of the equipment?

Mr. McCall: That is objected to on the grounds that it is incompetent, irrelevant and immaterial as he is not an expert.

Mr. Monteleone: Well, I asked him if he discussed it with him.

A. I discussed with them about what they thought had been produced, or what they thought they had been producing and we went over the various operations.

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

Q. Did you discuss with them, there, as to what was contained in this letter of April 5, 1945?

A. Well, I told them that I had received a copy of the letter.

Q. Did you discuss with them the complaints contained in that letter?

A. Well, I tried to ascertain from them as much as I could, all information as to what their production had been amounting to and what their costs were.

Q. Did you ascertain that they were not averaging 800 cubic yards of material per day at each plant?

A. I don't think I asked them about "800 cubic yards" per day, as I had not seen the contract, as yet.

Q. But you had seen the letter of April 5, 1945?

A. Yes.

Q. Then, I am not asking about the contents, but did you discuss with them about not producing 800 cubic yards of material per plant per day?

A. I don't recall that I asked that particular question.

Q. What was the amount that they said they were producing at the time you discussed this situation?

A. At the time I discussed it, I think neither one of them could agree on the amount of material they had been producing, and neither one had the records to show. They said they had had break-

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

downs from time to time and had had trouble in getting their plant going and they said they had had to rent a plant from Basich—and Mr. Basich had told me that.

Q. Did you discuss with them and ask whether or not they had been averaging 800 cubic yards per day?

A. I don't recall that I did.

Q. After you left there, did you go to the Duque and Frazzini plant?

A. Mr. Duque took me around in his car and showed me the various operations.

Q. What was the result of your investigation?

Mr. McCall: I object to that on the ground that there has been no showing made that this man knows anything about the operation of machinery.

A. I recall that there was a lot of dust blowing around there.

Q. (By Mr. Monteleone): You remember that you referred to this rock crusher as "nothing but a small coffee grinder," isn't that true?

A. I don't recall that, no. I probably referred to it as "the squirrel cage." I think Mr. Basich was the originator of the term "coffee grinder."

Q. In other words, that crusher did not impress you very much, did it?

A. Actually I did not know much about crushers. I had never seen one before.

Q. Well, while you were there, did you ask Mr. Basich as to his opinion about making the plant more efficient?

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

A. I did not ask it. I think he volunteered it.

Q. What did he say in that respect?

A. I think he told me that the method of feeding the A, B, C, plant was not efficient; that they were using a carry-all and a bulldozer to shove the material down into the grizzly.

Q. While you were there didn't he suggest it would be better to acquire a plant from P.D.O.C., which would do the work more efficiently?

A. I don't think Mr. Basich took it up with me.

Q. Did Mr. Duque or Mr. Frazzini?

A. Yes, I think they said that Basich said such a plant was available and that they should get it.

Q. Did you make a trip with Mr. Kovick of the Basich Brothers Construction Company to view this plant? A. No.

Q. Did you see this plant while you were in Tucson? A. No.

Q. Did you inquire as to the terms under which this plant could be acquired from P.D.O.C.?

A. No, sir, I didn't but Duque and Frazzini told me.

Q. What was said by them about that?

A. I don't recall—twelve cents per yard, I think, truck measure, or ten cents per yard was mentioned—I don't exactly remember.

Q. While you were there, did you get any information from P.D.O.C.; or any inquiry from P.D.O.C. that arrangements were being made for Duque and Frazzini to rent this equipment?

A. No.

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Q. While you were there, didn't you tell Mr. Basich that Duque and Frazzini had arrangements with P.D.O.C. to obtain this plant? A. No.

Q. Did you have any conversation with Basich about Duque and Frazzini having acquired the plant?

A. No. I attended a conference with Mr. Basich and Mr. Kovick and Mr. Duque and Mr. Frazzini were there. I think it was on April 25th.

Q. What transpired at that conference?

A. Well, as I recall, on the evening before the conversation, Mr. Frazzini told me that Mr. Basich had been talking with Mr. Earl, I believe his name is—of P.D.O.C. and they told me that the plant was available and the terms; that they had an appointment with Mr. Basich the next morning and I went along with them to Mr. Basich's office.

Q. You told me that you made two or three more visits to the pit after the first visit, with Mr. Basich?

A. I went there two days.

Q. What was your purpose in going there?

A. I had no transportation there and I was waiting for some good Samaritan to give me a ride.

Q. What was the occasion of your going there—what was the purpose?

A. Well, I went there with Mr. Basich?

Q. I understand that you went there on the first day with Mr. Basich? A. Yes.

Q. What was your purpose in going to Duque and Frazzini's office after the first occasion?

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

A. I was trying to get information to make a report as to the situation.

Q. What other information did you get on these later occasions that you had not received on the first occasion?

A. I think I went into the equipment they had and how much rent they were paying and from whom they were renting it.

Q. Was that all—on the second occasion?

A. Well, I don't recall as to——

Mr. McCall: (Interrupting) If you do not remember, just say so.

Mr. Monteleone: You are doing all right.

A. That was the information I was trying to obtain—their ideas as to how much production they had and what they were capable of producing.

Q. Did they give you any details as to what production they had? A. No, I don't think so.

Q. Did they give you any information as to what production they expected to have in the future? A. I don't remember that.

Q. Did they refuse to give you any information which they had available, which you requested of them, while you were there?

A. I don't know that they actually refused. There was certain information they said they could not give me.

Q. What information did they say they could not give you?

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

A. Well, with respect to the equipment they owned and the price, and what-not, for one thing.

Q. You mean the equipment which they owned at the pit?

A. At the pit and altogether—at the pit and otherwise.

Q. You mean, operated in connection with other than this job? A. Yes.

Q. What was the purpose of that?

A. I wanted to furnish that information to my office in San Francisco. That was part of my investigation duty.

Q. In other words, your office in San Francisco wanted you to inquire as to the financial responsibility of Duque and Frazzini?

A. I don't think they did.

Q. Isn't that information usually obtained before a bond is written?

A. Oh, yes. Usually there is some investigation.

Q. Do you know whether or not it was made in this case? A. I do not know.

Q. Then, before you left, you went over to Basich Brothers Construction Company's operations, did you not? A. Yes.

Q. That was near the project of the Government contract? A. Yes.

Q. There were one or two bookkeepers in the office were there not?

A. I believe a bookkeeper and one or two girls—stenographers.

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Q. They had a bookkeeper there, did they not?

A. Yes, I believe there was one bookkeeper.

Q. Do you remember his name?

A. Homer Thompson, I believe.

Q. They had books of record there?

A. Yes.

Q. Did you not at that time make a record of the production of Duque and Frazzini of this material.

A. I was given the information taken from their records. I don't think I made an examination of the records, myself.

Q. How long a time did you spend at the Basich Brothers Construction office?

A. I don't know. I went there soon after lunch and I was probably there for an hour or two hours. I don't remember.

Q. At that time did you make memorandum of the records kept by Basich Brothers Construction Company?

A. I believe I took down some records.

Q. That included the payrolls?

A. I believe they gave me that.

Q. And the record of the yardage?

A. I believe they gave me some figures on truck measurement.

Q. Did they include the payroll in that figure?

A. No, I believe that the figures were made by deliveries made by the truck load.

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Q. Did they tell you what they were to pay Duque and Frazzini? A. I don't think so.

Q. Did you inquire of Duque and Frazzini as to what they were to be paid?

A. I believe I did later.

Q. You saw the Duque and Frazzini contract before you went to the office of Basich Brothers Construction Company, didn't you?

A. No, I don't think they had it available then.

Q. Did you check at the Basich Brothers Construction Company offices as to the amount of equipment rentals?

A. They did not have the amount up to date and could not give it to me.

Q. They gave you what they had, didn't they?

A. They gave me a payroll and some equipment rentals and some rental on trucks up to the first of April.

Q. They offered to furnish you with what information you wanted from time to time, didn't they?

A. Yes, they were very cooperative.

Q. Did you, later on, make any request of Basich Brothers Construction Company for information in connection with the labor, expense or equipment expense, or outstanding bills, or the amount of money they were earning under their contract?

A. Well, I believe I did. I was over there at the middle of May and I met Mr. Kovick and Mrs. Thompson. I don't believe Mr. Basich was there then.

A
C
any

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

Q. You made another visit there in about the middle of May? A. Yes, sir.

Q. Did you—meaning the Glens Falls Indemnity Company, make a written request of Basich Brothers Construction Company for any written statements of the amount of money earned by Duque and Frazzini under the contract, or for any labor or equipment expenses up to the present time—

Mr. McCall: (Interrupting) Just a minute.

Mr. Monteleone: Well, we will cut out “up to the present time” and make it read up to the time you made the second trip to Tucson.

Mr. McCall: I object to any other inquiry as the question is not framed. I object to the entire question on the grounds that it calls for a conclusion of the witness and presumes that he knows everything that everyone in connection with this Glens Falls Indemnity Company has done.

Mr. Monteleone: I mean to your personal knowledge.

A. No, not to my personal knowledge.

Q. Upon until the time you had full investigation authority in this matter, didn't you?

A. I would not say that.

Q. Well, you made a full investigation?

A. I made that investigation.

Q. You know that you did not make any request, and that, so far as you know, no one else made such a request—is that right? A. Yes.

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Q. When was it, with reference to the first visit that you made, that you went to Tucson again?

A. I think it was some time just prior to the middle of May.

Q. Prior to going to Tucson on the second occasion, about the middle of May, you received a letter from the Basich Brothers Construction Company, dated April 27, 1945, isn't that true?

A. Well, I don't know.

Q. I show you a copy of it and ask you to look at it.

A. I have received so many letters that I don't know all of them.

Q. Now, Mr. Bray, I have shown you a copy of what purports to be a letter addressed "To Duque & Frazzini, Post Office Box 73, Tonopah, Nevada, and Glens Falls Indemnity Company of Glens Falls New York, dated April 27, 1945, and signed "Basich Brothers Construction Company" and ask whether or not you have any recollection of receiving that letter?

A. I am quite certain that I received that.

Q. You are quite certain you received it soon after the date it bears, April 27, 1945?

A. I am not certain of that but I presume I did.

Q. You read it over after receiving it?

A. Yes.

Q. At the time you read it, had you learned what the contents of the contract between Basich Brothers

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Construction Company and Duque and Frazzini were? A. Yes, I am sure that I had.

Q. Did you have a copy of it in your office?

A. Yes, I think so.

Q. At that time did you learn what the terms of the contract and bond were?

A. I am not sure of that. I don't think I have had a copy of the bond.

Q. Well, not having a copy, did you have knowledge as to the substance of it?

A. Well, I don't think so, no sir.

Q. Had you made an effort to get it?

A. I had written to San Francisco.

Q. When with regard to April 27, 1945?

A. I think it was after I got back from Tucson.

Q. When did you go to Tucson?

A. Oh, I left here on the night of April 21.

Q. When you received this letter, did you or your company acknowledge receipt of it?

A. I think Mr. McCall officially acknowledged the receipt of it. I think I discussed it with him.

Q. In other words, after the receipt of that letter, you discussed it with Mr. McCall, the attorney for the company? A. Yes.

Q. And you told him the situation, did you?

A. Yes.

Q. Did you ask him to answer the letter for the company?

A. I am not sure what I said, but he answered it, I believe.

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Q. In other words, Mr. McCall had the authority to answer that letter dated April 27, 1945?

A. Yes.

Q. In that letter it called attention to the fact that the Duque and Frazzini contract required Duque and Frazzini to erect two plants, each to produce 800 cubic yards of material per day, to be used on a Government contract that they had; that they had at that time failed to comply with that requirement. Did you follow up and make an examination or investigation to verify the truth of this statement made in the letter of April 27, 1945?

A. I don't remember what I did in that regard, now.

Q. Did you contact Basich Brothers Construction Company shortly after—say within three or four or five days after you received this complaint, to check on this complaint they made on failure to erect two plants each capable of producing 800 cubic yards per day?

A. I don't think it required 800 cubic yards per day, or what it said.

Q. What did you understand it to say?

A. 800 cubic yards, I think it said.

Q. Now, in the letter that Mr. McCall wrote in response to that letter, you referred to the fact that it required the erection of two plants of 800 cubic yards capacity per day?

A. I don't know what that was—I don't know as I discussed it with him.

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

Q. But you understood that it required the erection of two plants of 800 cubic yards per day?

A. I don't know as I did.

Q. Did you discuss it with Mr. Basich?

A. I believe that Mr. Basich in his letter said that that was his agreement.

Q. Now, when Mr. Basich, in his letter of April 27, 1945, stated that this was the agreement, at which time you had already seen the contract, itself, did you call Basich Brothers Construction Company's attention to the fact that the contract did not state that the plant was to be for each plant 800 cubic yards per day, or an output of 800 cubic yards per day? A. When was that?

Q. April 27, 1945.

A. I don't think I talked with him after April 27th.

Q. Did you in this letter state that his letter referred to 800 cubic yards per day, per plant? While the contract only specified 800 cubic yards, without stating "per day"?

A. I don't recall that.

Q. You just assumed that it was 800 cubic yards per day without reading it out?

A. I don't know as I had any understanding as to that but it was what the contract stated.

Q. Now, did you contact Duque and Frazzini after you received this letter of April 27, 1945, to find out whether or not they were producing the

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

amount of material which Basich Brothers Construction Company, in this letter of April 27, 1945, stated they had not been producing?

A. I think I talked with either Mr. Duque or Mr. Frazzini at Tucson, on the telephone.

Q. I don't want what you think, but do you remember what you did?

A. I don't remember whether I did, or not.

Q. Did you write to them inquiring about it?

A. I don't think so.

Q. What, if anything, did you do to investigate the complaint made by Basich Brothers Construction Company as contained in the said letter of April 27, 1945?

A. Well, I don't think that I did anything other than I believe we had a conference here in Mr. McCall's office at which I believe you and Mr. Basich were present, sometime in the early part of May.

Q. Did you send a copy of this letter of Basich Brothers Construction Company, dated April 27, 1945, to your San Francisco office? A. Yes.

Q. You kept your San Francisco office advised, constantly, then, on these matters?

A. Oh, I sent them copies of all letters, yes.

Q. We had a conference in—on May 3rd, 1945, with Mr. McCall, in which Mr. Basich and myself, as attorney for Basich Brothers Construction Company, yourself as representative of the Glens Falls Indemnity Company and Mr. McCall as attorney for Glens Falls Indemnity Company were present. Is that correct?

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

A. Yes, we had a conference.

Q. At that time Mr. Basich advised you, did he not, that the crushing plant of Duque and Frazzini was, as he then referred to it, as I recall, as a "coffee grinder" and you referred to it as what?

A. A "squirrel cage." It had the screen on it and looked like a squirrel cage.

Q. And you agreed that something should be done to correct that situation?

A. Well, Mr. Basich remarked on it and said they had not bothered them yet but he was afraid they would not be able to produce sufficient material.

Q. At that time he said they were not producing 800 cubic yards a day?

A. I think he mentioned it, and you mentioned that, too.

Q. And he said that they were not producing half of that, didn't he?

A. I don't recall.

Q. Well, what was said about that?

A. I don't remember.

Q. You did go to Tucson again, after that, didn't you?

A. Yes.

Q. How long after this conference was that?

A. About a week.

Q. What was your purpose in going to Tucson, then?

A. I went there with the engineer to take a look at the thing. The San Francisco office had made arrangements with him and——

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Q. Was that a San Francisco office engineer?

A. Yes, he was some engineer that they arranged with.

Q. What was his name? A. Mr. Bellou.

Q. That date would be what, would you say?

A. Once again I will have to get the calendar out—I think I left here on the night of May 10. That is approximately the date, anyway.

Q. Before you left, did you confer with Duque and Frazzini about the matter?

A. I rather think that I called them.

Q. In the letter that Mr. McCall had written acknowledging receipt of Basich Brothers Construction Company, he says, "I was advised by Mr. Bray this morning that he called Duque and Frazzini and was told that they are now turning out the required quantity of material and, if necessary, they will operate another shift." Is that right?

A. I would say that is correct. I called them on two or three occasions.

Q. You called them and made statements that there were complaints made by Basich Brothers Construction Company that they were not producing a sufficient amount of material, is that right?

A. I am not sure if they called me or I called them. I told them that there was such a complaint.

Q. You told Basich Brothers Construction Company that a copy of that letter was sent to Duque and Frazzini? A. I assume so.

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

Q. That is right. I mean a copy of the letter that Mr. McCall had written, dated May 8, 1945—a copy of that was sent to Duque and Frazzini?

A. That, I am not certain of. I don't know.

Q. Now, did you discuss with Mr. McCall the contents of this letter dated May 8, 1945, addressed to Basich Brothers Construction Company?

A. The letter he drew—I rather think he discussed it with me.

Q. In other words, did you know the contents of it before it was mailed to the addressee?

A. I rather think so.

Q. How long did you stay in Tucson on the 14th day of May—the 10th day of May?

A. I think I arrived at Tucson on the night of May 11 and left there around noon of May 13th, which was Sunday.

Q. Now, whom did you see while you were there?

Mr. McCall: I object to that as being too general.

Mr. Monteleone: I mean in this connection.

Q. (By Mr. Monteleone): Did you see Mr. Duque and Mr. Frazzini? A. Yes.

Q. And did you see any one connected with Basich Brothers Construction Company?

A. I saw Mr. Kovick.

Q. Did you go to Basich Brothers Construction Company's office? A. Yes.

Q. Whom did you see there?

A. I think Mr. Kovick and he drove us over the Basich job.

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Q. While you were at the plant of Duque and Frazzini, did Mr. Bellou make any suggestions to any one as to what changes should be made in the plant?

A. I think he discussed with them some changes in their operation.

Q. Can you recall what changes he indicated?

A. No, I don't know. He felt that they had too big a power unit on their "coffee grinder plant" as Mr. Basich called it, and that they had changed over to a truck feeding of the plant which he agreed was a proper procedure. I do not recall any other suggestions that he made to them. I don't think he went there so much for the purpose of making suggestions as he did for the purpose of making a report to the company.

Q. Did he make a report to the company?

A. He made a verbal report to me.

Q. Did you write that report to San Francisco?

A. Yes.

Q. Did you make a copy of that report and send the same to Duque and Frazzini? A. No.

Q. Did you inform them of the contents of that report?

A. I don't think I made any other reports—I don't think I made them any report other than what we talked of while there. I don't think I made any.

Q. Did you discuss with or inform any one connected with Basich Brothers Construction Company

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

as to the recommendations or the report that Mr. Dellou had made? A. No.

Q. While you were there in Tucson, did you make any inquiries from Duque and Frazzini as to the amount of payroll or the amount of material or the amount for rental of equipment or the amount they had earned?

A. I believe I did. They said they had not received a statement from Basich Brothers Construction Company as to that.

Q. Did you see any records there?

A. Yes.

Q. What was that?

A. They had a statement of the number of men and the hours worked and the rate of pay but they had no extensions and they had some bills.

Q. Did you go to Basich Brothers Construction Company and examine their records?

A. I did not examine their records but I asked for information and they gave it to me.

Q. Did they give you the information you requested?

A. They gave me the information on the payrolls the same as they did before, but they did not have a posting on the rental of equipment and they did not give me any totals on that.

Q. To what date did they give you the postings on, as to the equipment?

A. To the first of April.

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Q. They did not give you information as to the payments made by Basich Brothers Construction Company showing that the rental on equipment far exceeded the amount of material that they had coming from Basich Brothers Construction Company? A. They did not.

Q. You knew that, didn't you? A. No.

Q. When did you first learn that the amount of rental paid out by Basich Brothers Construction Company for labor and rental of equipment far exceeded the earnings of Duque and Frazzini?

A. I didn't find that out until I went over there later.

Q. When was that?

A. The latter part of May.

Q. I call your attention to a letter bearing date May 24, 1945, addressed to Duque and Frazzini and Glens Falls Indemnity Company of Glens Falls, New York, signed by Basich Brothers Construction Company and ask whether or not you recall receiving that letter?

A. I believe I received it, yes.

Q. You received that letter before you went to Tucson with Mr. McCall, where you met myself and Mr. Basich, did you not? A. I think so.

Q. Calling your attention to that letter, it mentions the fact, doesn't it, that the following fact—"You and each of you are hereby notified that said subcontractors are not paying the just labor claims arising under said contract of date February 7,

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

1945, and apparently will encounter difficulty in continuing the payment of said labor claims. You, and each of you are hereby notified that pursuant to said Article XI contained in said contract of February 7, 1945, the prime contractor has made labor payments, material payments and supply payments for said subcontractors in the past for the prosecution of said work but that the amount of moneys due the subcontractors is not sufficient to meet the past advancements made by the contractor Basich Brothers Construction Company; that such deficiency shall be chargeable against the subcontractors and the above surety Glens Falls Indemnity Company. As soon as an account can be prepared on this matter, the same will be submitted to you." Now, then, you did know that there was a deficiency.

A. I did receive that letter—if that is knowledge.

Q. When you received that letter, did you acknowledge receipt of the same?

A. I think that Mr. McCall did. It was referred to him for attention, anyway.

Q. It was referred to Mr. McCall?

A. Yes.

Q. Did the Glens Falls Indemnity Company, through your office, or the San Francisco office, ever acknowledge this letter?

A. Not unless Mr. McCall acknowledged the receipt of it.

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Q. Now, this letter of May 24, 1945, further states, "You are hereby further notified that demand is hereby made upon the said principal and the said surety on said bond to make all present payments due on labor claims arising under said contract and all further and future labor claims as provided in said bond and in said agreement of date February 7, 1945, and, upon failure to do so, the contractor, Basich Brothers Construction Company, will make said payment and charge the same against said surety and said principal." You recall reading those statements, is that true?

A. I undoubtedly read it.

Q. Now, at the time you received this letter dated May 24, 1945, had you read the contents of the sub-contract between Basich Brothers Construction Company and Duque and Frazzini, bearing date of February 7, 1945?

A. Yes.

Q. At the time you received that letter of May 24, 1945, did you know what the contents of the bond was that had been executed by the Glens Falls Indemnity Company?

A. I believe so.

Q. You knew all of the conditions and restrictions contained in that bond at that time, is that right?

Mr. McCall: I object to that on the grounds that it is calling for a conclusion of the witness and the bond speaks for itself.

Q. (By Mr. Monteleone): Now, you state that Mr. McCall acknowledged receipt of this letter—is that right?

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

A. I say that it was referred to him for attention.

Q. Did you see the letter which Mr. McCall sent in acknowledgment of the receipt of the letter dated May 24, 1945?

A. If he dispatched such a letter I undoubtedly saw it or a copy of it.

Q. Now, I will show you a letter signed by Mr. McCall, dated June 7, 1945, and it states: "This will acknowledge receipt of copy of letters which you addressed to Duque and Frazzini at Tonopah, Nevada, May 23rd, 24th and June 1st, 1945, with reference to a subcontract which they have with you." Is this a copy of the letter which Mr. McCall wrote for the Glens Falls Indemnity Company?

A. Yes.

Q. You did see it before it was forwarded?

A. Yes.

Q. You did see the letter of May 24, 1945, before acknowledging receipt—before the sending of this letter of June 7, 1945, is that true?

A. What is that?

Mr. Monteleone: Strike the question and I will reframe it.

Q. (By Mr. Monteleone): Isn't it true that before Mr. McCall acknowledged receipt of the letter of May 24, 1945, by his letter dated June 7, 1945, you received from Basich Brothers Construction Company another letter dated June 1, 1945, a copy of which letter I will now show you.

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

A. If you say that this is a copy of it, we undoubtedly received it.

Q. Do you have a recollection of receiving it?

A. I have no recollection of receiving numerous letters. If you say that is one sent to us, I undoubtedly received it.

Q. Now, in that letter dated June 1, 1945, it stated as follows: "Whereas, your attorney, Mr. John McCall, was this date advised via telephone that we have just received information that your insured, Duque and Frazzini, shut down their small crushing plant on May 31, 1945, and contemplate closing the Pioneer Plant June 2nd and June 3rd, 1945," was that letter read by you?

A. Well, undoubtedly it was if that letter was sent to me by you—I evidently saw it.

Q. You were advised by Basich Brothers Construction Company, prior to the time you went to Tucson with Mr. McCall and Mr. Basich and myself, that the Government was insisting on the bomber ground being completed without any delay?

A. I think I knew that, if I got a letter—which I undoubtedly did.

Q. What did you do after receiving the letter dated June 1, 1945, toward investigating what was complained of?

A. I can't remember now just what I did. I may have received a call from Duque and Frazzini or called them. I remember that I did get calls from them from time to time.

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

Mr. McCall: I suggest that you just answer what you know of your own knowledge and not what you suspect—what you suspect you may have done.

Q. (By Mr. Monteleone): Do you have any records as to whether or not you had contacted Duque and Frazzini during the period from the 24th day of May, 1945, to the first day of June, 1945—Cut that out.

Do you have any records of any kind to show whether you contacted Duque and Frazzini from the 24th day of May, 1945, until we met in Tucson?

A. That, I do not know.

Q. Do you have any such record or recollection?

A. I have not reviewed the file recently.

Q. Do you recall whether or not you wrote any letters to them during that time?

A. I don't recall that I did.

Q. Now, we met in Tucson on May 28th, 29th and 30th—Isn't that correct?

A. It must have been about that time. It was a nice trip, anyway.

Q. Well, while you were there did you make any inquiry from Duque and Frazzini as to how much their expenses were up until that time, including payroll and rental of equipment?

A. Oh, I don't think Duque and Frazzini had enough records to show that.

Q. That is not the question.

Mr. McCall: This is off the record.

(Discussion between counsel off the record.)

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Mr. Monteleone: Will you please read the question?

(The question is repeated by the Notary Public.)

A. Oh, I think I made some inquiry but I don't think I got any information as to the payroll.

Q. (By Mr. Monteleone): Did you make any inquiry from Basich Brothers Construction Company as to the amount of the payroll?

A. I am inclined to think that Mr. Thompson gave me those figures or Basich Brothers Construction Company did—Mr. Basich did—I don't remember which.

Q. Did Mr. Duque or Mr. Frazzini give you the amount of the rental of equipment?

A. Mr. Basich did. I don't think that Duque and Frazzini had it, but Basich Construction Company gave me some yellow sheets which had that information on them, which was in their office.

Q. Mr. Basich at that time gave you the amount of the payroll and the amount of the rental for equipment?

A. Well, I don't think he knew at the time but he gave me what he had.

Q. You mean at that time? A. Yes.

Q. You knew at that time that the labor bills and the rental of equipment and the bills payable far exceeded what they had earned on the contract, did you not?

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

A. Well, that was Mr. Basich's statement. He contended that they owed more than they earned.

Q. Well, Mr. Basich said that Duque and Frazzini were far behind what they had earned on account of labor and material bills and rental of equipment?

A. That is what Mr. Basich contended.

Q. What did you say to Mr. Basich when he gave you that information?

A. I don't recall that I told him anything. I think I probably told him——

Mr. McCall (Interrupting): Just a minute. The question has been answered. The answer is not as to what you think you may have told him.

Q. (By Mr. Monteleone): Now, did you make a check, while you were in Tucson on the last occasion, to see how much material was being produced by Duque and Frazzini?

A. Well, I am not certain whether Mr. Basich's office furnished me with the truck yardage, or not. I imagine he did.

Q. From the information that Basich Brothers Construction Company furnished you at that time, you knew, did you not, that Duque and Frazzini were not averaging 800 cubic yards per plant per day?

Mr. McCall: All of this refers to the last trip that the four of us made to Tucson?

Mr. Monteleone: That is right.

A. I don't think that I computed it but I think that was probably correct.

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Q. (By Mr. Monteleone): You knew that——

A. Of course, incidentally, I might say that the only information that Basich Brothers Construction Company was prepared to show me as to yardage was the truck yardage, which was different from actual yardage.

Q. I show you a letter dated May 23, 1945, from Basich Brothers Construction Company to Duque and Frazzini and ask whether or not you recall receiving this letter?

A. I undoubtedly received it. [54]

Q. Calling your attention to the letter of May 23, 1945, I will read this portion of it: "Now, therefore, you, Duque & Frazzini, as Principal on said bond, and you, Glens Falls Indemnity Company, a surety thereon, are again notified that said Duque & Frazzini have failed to correct their said default in that they are not prosecuting said work with sufficient workmen and equipment to insure its completion within the specified time; furthermore, that instead of each of the plants referred to in said contract of date February 7, 1945, producing 800 cubic yards of suitable material as therein required, each of said plants is producing an average of approximately 300 cubic yards a day." Do you recall receiving that information?

A. I don't remember, but I probably did.

Q. So, you did know, after reading this letter dated May 23, 1945, that Duque and Frazzini had

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

not been averaging 800 cubic yards per day from each plant but had only been averaging 300 cubic yards per day?

A. That is what you said in that letter.

Q. Did you investigate as to whether or not this information, as stated by Basich Brothers Construction Company was true or untrue?

A. I do not remember.

Q. You do not remember whether you did or did not?

A. That is right. I think that was received just a few days before we went over to Tucson, if I recall.

Q. Now, at the time you received this letter of May 23, 1945, did you acknowledge the receipt of the same in any other manner except by this letter of Mr. McCall's dated June 8, 1945? A. No.

Q. Did you discuss the contents of the letters of May 23rd, May 24th, or June 1st, 1945, to which I have previously referred, with Mr. A. L. Basich, or any one connected with Basich Brothers Construction Company, in any other manner than you have already referred to?

A. I do not recall that I did.

Q. Now, when you were in Tucson, on this last occasion, which was the 28th, 29th and 30th of May—my diary indicates that and I believe that is correct. I hope so, any way. Did you make any recommendation to Duque and Frazzini in connection with their operations? A. No, I don't think so.

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Q. What, if any matters did you discuss with them in connection with the operation?

A. Well, I don't remember. I couldn't remember that now.

Q. Did you make any record as to what you discussed or observed at that time?

A. I probably did. I probably wrote a report to the San Francisco office after coming back.

Q. Have you any recollection of what it contained?

A. It was just as to what had transpired there.

Q. What do you recall as to the contents of the report?

A. I related the different conferences we had with you and Mr. Basich and those various other things.

Q. All that you stated to your San Francisco office in your report was what actually transpired while we were there?

A. That is right.

Q. Did you advise your San Francisco office as to the complaint that Basich Brothers Construction Company were making from time to time as to the progress of the contract?

A. I sent them copies of your letters.

Q. Now, on June 8, 1945, you—and when I refer to “you” throughout this deposition, I am referring to you as a representative of the Glens Falls Indemnity Company or to the Glens Falls Indemnity Company, itself—Did you receive a copy of the letter which I now exhibit to you?

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

A. That looks like one we received. It is quite a few pages long.

Q. In that letter of June 8, 1945, there was enclosed a copy of a letter from the United States Resident Engineer, B. C. Woolhums—isn't that true?

A. Yes, I have a recollection that some sort of enclosure of what purported to be a copy of a letter from him was enclosed.

Q. I show you what purports to be a copy of the letter from him and ask you whether or not you think that is his letter?

A. I have no recollection of the letter, but if you say it is a copy, it must be.

Q. Now, in that letter of the United States District Engineer, it called attention to the fact that the Government job had been shut down from time to time on account of lack of material.

Mr. McCall: I object to that on the ground that it is calling for a conclusion. He would not know that.

Mr. Monteleone: I say the letter calls that to your attention?

A. I don't remember what was in the letter. I would have to see it.

Q. Do you wish to see the letter now?

A. Well, the letter speaks for itself.

Q. Did you do anything in connection with the complaint from any letter—particularly the com-

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

plaint made in the letter of June 8th and the complaint of the United States Engineer?

A. I referred it to Mr. McCall.

Q. You referred it to Mr. McCall?

A. Yes.

Q. Did you make any investigation so far as Duque and Frazzini were concerned?

A. I don't remember.

Q. Did you contact Duque and Frazzini?

A. I don't remember that.

Q. Did you contact Basich Brothers Construction Company or any one connected with Basich Brothers Construction Company in connection with the matter?

A. I don't remember that I did. I don't believe that I did but I am not sure.

Q. Now, up to the time you received this letter of June 8, 1945—did you—when I say “you” I mean the Glens Falls Indemnity Company, serve or mail—if served on or mailed, to Basich Brothers Construction Company any notification or any letter aside from the letters sent by Mr. John McCall?

A. Well, so far as I know, no—that is any that I personally know of.

Q. Now, after you received this letter of June 8th, you also received a further letter from Basich Brothers Construction Company on June 9, 1945, did you not—A copy of which—addressed to Duque and Frazzini, a copy of which was sent to your office?

A. I think we got a copy of that.

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

Q. Did you, or any one for your company, make any suggestions to Basich Brothers Construction Company as to whether you desired Basich Brothers Construction Company to continue with the contract or whether your company desired to make arrangements for the prosecution of the work?

Mr. McCall: I object to that as it assumes that he had a right to go to Basich Brothers Construction Company to make suggestions.

Mr. Monteleone: I want to know if he made any suggestions.

Mr. McCall: What kind of suggestions?

Mr. Monteleone: I just want to know if he made any suggestions to you or to the Company?

A. I don't know. I did not, personally.

Q. (By Mr. Monteleone): Do you know whether or not at any time, up to the present time, your company ever notified Basich Construction Company that they desired to carry on the work of Duque and Frazzini after Duque and Frazzini left the job?

Mr. McCall: I object to that as assuming that they had a right or obligation to suggest that to them.

Mr. Monteleone: I am not assuming that so far as any rights were concerned, but did that company ever insist, or not?

A. So far as I am concerned, personally, no.

Q. (By Mr. Monteleone): Now, I will call to your attention a letter dated June 23, 1945, ad-

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

dressed to Basich Brothers Construction Company, signed John E. McCall, and ask whether or not you have had seen the letter or the contents of the letter before it was sent to Basich Brothers Construction Company?

A. Oh, I undoubtedly read it either before or after it was mailed. I don't recall which.

Q. Now, did you converse with Mr. McCall, so far as the contents were concerned, before the letter was mailed? A. That, I don't recall.

Q. Do you know of any other letter or notification sent to Basich Brothers Construction Company in reply to their previous letters addressed to your company, copies of which were sent to your company, aside from the copies of letters sent by Mr. McCall, prior to June 23rd, 1945?

A. Will you read that?

Mr. Monteleone: Will you please read the question?

(The question is repeated by the Notary Public.)

A. I have no personal knowledge of that.

Q. (By Mr. Monteleone): Have you ever seen any such records? A. No, I have not.

Q. Have you ever inquired as to any information as to whether or not such letters existed?

A. No, I have not.

Q. Now, have you read the First Amended—Proposed First Amended Answer of Glens Falls Indemnity Company to the Complaint of Basich Brothers Construction Company?

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

A. Well, I probably have read it. I don't know. I haven't read it with extreme care because I am no lawyer.

Q. I understand, but you read the proposed amended answer before it was filed—is that right?

Mr. McCall: I will stipulate that he did not even see it.

Q. (By Mr. Monteleone): Now, in this proposed amended answer, on page 11 thereof, it alleged that the plaintiff, Basich Brothers Construction Company, failed to comply with the conditions precedent contained in the bond, in that Basich Brothers Construction Company failed to notify Glens Falls Indemnity Company within twenty days after they acquired information on the default of Duque and Frazzini, that they were not producing 1600 cubic yards of material per day and did not commence work on the 19th day of February, 1945, as called for in the contract.

Mr. McCall: There is no correction, Mr. Monteleone, at all.

Q. (By Mr. Monteleone): Now, you learned of that situation, did you not, when you received a copy of a letter addressed to Duque and Frazzini bearing the date of April 5, 1945, isn't that true?

A. Well, the letter said that. I guess that that is what it said.

Q. Now, when did you receive that letter—a copy of that letter bearing date April 5, 1945?

A. Well, I suppose I received it.

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Q. When you received that letter, did you notify Basich Brothers Construction Company that they had failed to give you notice within twenty days and that you were going to stand on the condition in the bond? A. Personally, I did not.

Q. Do you know whether or not any such information had been given to Basich Brothers Construction Company at any time by any person connected with the Glens Falls Indemnity Company that they would stand on that provision of the bond because they did not receive such notice within twenty days? A. Personally, no.

Q. In this proposed amended complaint, on page 14, is contained the allegation, on information and belief—that on or prior to the 8th day of June, 1945, the subcontractors, Duque and Frazzini, had abandoned work under the said alleged subcontract, which so compelled the plaintiff to cease operations thereon. Now, when if at all, did you first receive information the Duque and Frazzini had abandoned the work under the contract?

A. That, I don't remember.

Q. With reference to the 8th day of June, 1945, was it on that day or shortly thereafter?

A. Well, so far as I know, the letters which you mentioned as having been written, are the only notices that I had.

Q. So, the only information that you had, then, would be the letters written to your company by the Basich Brothers Construction Company?

A. So far as I know, yes.

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

Q. Did you receive any letters or information from Duque and Frazzini, direct?

A. Not so far as I remember.

Q. Did you receive any information that Duque and Frazzini were compelled by Basich Brothers Construction Company to cease operations?

A. I don't remember that.

Q. You do not remember of receiving such information? A. No.

Q. Your answer was no?

A. I don't remember of it, no.

Q. Now, you know, as alleged in the proposed amended answer, commencing on page 14, that you are informed and believe and therefore allege that from the 11th day of February, 1945, until on and after the 8th day of June, 1945, the plaintiff violated the terms of the alleged subcontract and, particularly, Article 16 thereof in that plaintiff paid to or for the account of said subcontractor, on account of said subcontract work, large sums of money, in excess of 90% of the engineers' estimate. Now, you knew that prior to the 8th day of June, 1945, did you not?

A. No, I don't think I knew it.

Q. You received words from the Basich Brothers Construction Company prior to that, did you not?

A. Well, Mr. Basich was contending that when we were there in May.

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Q. What did you tell Mr. Basich about that when he said that?

A. I don't think I told him anything.

Q. Did you tell him that he was violating Article 16 of the contract in doing so?

A. No, sir, I did not tell him.

Q. Did you at any time, or did your company at any time prior to the filing of the answer to the plaintiff's complaint, notify Basich Brothers Construction Company that they were violating Article 16 of the contract by paying these large sums of money in excess of 90% of the engineers' estimate?

A. I did not, personally.

Q. Do you have any knowledge of it?

A. No, I have not.

Q. In what respect do you contend that Basich Brothers Construction Company were violating Article 16 by paying these large sums of money in excess of 90%?

Mr. McCall: I object to that on the ground that the contract speaks for itself and is the best evidence.

Mr. Monteleone: I think that is a legal matter, Mr. McCall.

Q. (By Mr. Monteleone): Now, on page 15 of the "Proposed Amended Answer" it is alleged that Basich Brothers Construction Company furnished its own employees to the subcontract work. Do you know of any employees which Basich Brothers Construction Company furnished to Duque and Frazzini—of your own knowledge?

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

Mr. McCall: You mean as to his own personal knowledge?

Mr. Monteleone: Yes, of your own knowledge.

A. Not to my own personal knowledge, no.

Q. (By Mr. Monteleone): And from your investigation which you carried on, as you have already testified to, did you ascertain any information which would show that Basich Brothers Construction Company had concealed from the Glens Falls Indemnity Company any payment of "large sums of money" to Duque and Frazzini?

A. No.

Mr. McCall: I object to that as that is a legal question as to whether or not he concealed any legal evidence? That is asking for a legal conclusion.

Mr. Monteleone: I will withdraw it and put it this way.

Q. (By Mr. Monteleone): Did you find anything to the contrary from what you had been informed by Basich Brothers Construction Company as you have testified to in this deposition, with reference to payments made on the Duque and Frazzini contract, which was not substantiated?

A. What was that?

Mr. Monteleone: Will you please read the question?

(The question is repeated by the Notary Public.)

A. No. I don't understand it.

Q. You do not understand it?

A. No.

Plaintiff's Exhibit No. 23—(Continued)

(Deposition of John H. Bray.)

Q. Was there any information furnished to you which you testified to as you recited here, on your investigation, which proved to be false and untrue.

A. I still do not understand that question.

Q. Your answer—the Proposed Amended Answer of the Glens Falls Indemnity Corporation charges that the Basich Brothers Construction Company concealed and suppressed certain facts from the Glens Falls Indemnity Company. Now, do you know of any facts that Basich Brothers Construction Company concealed or suppressed from the Glens Falls Indemnity Company in connection with the Duque and Frazzini contract?

Mr. McCall: I object to that as calling for a conclusion of the witness and assuming, further, that the witness gave to the attorney the information from which this answer was drawn, which is not true.

Mr. Monteleone: I am asking him if he knows of any.

A. Not from my own personal investigation.

Q. (By Mr. Monteleone): From your investigation did you acquire any information that Basich Brothers Construction Company had concealed from the Glens Falls Indemnity Company any matters in connection with this contract?

Mr. McCall: I object to it on all of the grounds heretofore stated and further as calling for a conclusion of the witness and it asks him to assume a legal conclusion.

Plaintiff's Exhibit No. 23—(Continued)
(Deposition of John H. Bray.)

A. Oh, yes, I have conferred with him.

Q. Do you know of any other agent or employee of the Glens Falls Indemnity Company that he has conferred with excepting yourself?

A. I don't know of any.

Mr. Monteleone: I believe that is all.

Mr. McCall: I have no questions at this time.

Mr. Monteleone: It may be stipulated that this deposition may be signed before any Notary Public?

Mr. McCall: It is so stipulated.

/s/ JOHN H. BRAY.

Subscribed and sworn to before me this 25th day of September, 1946.

[Seal] /s/ JOHN E. McCALL,
Notary Public in and for the County of Los
Angeles, State of California.

State of California,
County of Los Angeles—ss.

I, Charles G. Murray, a Notary Public in and for the County of Los Angeles, State of California, do hereby certify:

That John H. Bray, was by myself, before the commencement of this deposition, duly sworn to testify the truth, the whole truth and nothing but the truth; that said deposition was taken on the 4th day of September, 1946, commencing at the hour of 2:00 o'clock p.m. at Room 926, Rowan Building, Los Angeles, California.

Plaintiff's Exhibit No. 23—(Continued)

That said deposition was written down in shorthand by myself and was thereafter transcribed into typewriting; and I further certify that the foregoing 72 pages are a full, true and correct transcript of my said shorthand notes.

I further certify that by stipulation and agreement of counsel said deposition may be signed before any Notary Public.

I further certify that I am not related to any of the parties to this action nor interested financially in the outcome of the same, nor am I related to or associated with counsel on either side of the case.

In Witness Whereof I have hereunto subscribed my name and affixed my official seal this 17th day of September, 1946.

[Seal] /s/ CHARLES G. MURRAY,
Notary Public in and for the County of Los
Angeles, State of California.

My commission expires May 21, 1947.

[Endorsed]: Filed June 18, 1947.

PLAINTIFF'S EXHIBIT No. 24

In the District Court of the United States, Southern
District of California, Central Division

No. 5021-P.H.

BASICH BROTHERS CONSTRUCTION
COMPANY, a corporation,

Plaintiff,

vs.

GLENS FALLS INDEMNITY COMPANY, a
corporation, and ANDREW DUQUE and
CARSON FRAZZINI, co-partners doing busi-
ness under the firm name of DUQUE AND
FRAZZINI,

Defendants.

DEPOSITION

Be It Remembered that, pursuant to oral stipulation of Counsel for the parties hereto, that on Monday, January 20, 1947, commencing at the hour of 1:30 o'clock p.m. thereof, at the law offices of Richard Blakey, 26 West Second Street, Reno, Washoe County, Nevada, before me, Jeanne Brannin, a Notary Public in and for the County of Washoe, State of Nevada, personally appeared Carson Frazzini, one of the defendants herein, produced as a witness, who, being by me first duly sworn, was thereupon examined and interrogated as a witness in said cause.

(Plaintiff's Exhibit No. 24—(Continued))

Stephen Monteleone, Esquire, 714 West Olympic Building, Los Angeles 15, California, appeared as attorney for the plaintiff, Basich Brothers Construction Company, a corporation.

John E. McCall, Esquire, 458 South Spring Street, Los Angeles, California, appeared as attorney for the defendants, Glens Falls Indemnity Company, a corporation, and Andrew Duque and Carson Frazzini, co-partners doing business under the firm name of Duque and Frazzini, defendants.

It was stipulated between counsel for the respective parties that the Deposition be signed before Jeanne Brannin a Notary Public, after it had been transcribed, and that the original of said Deposition be mailed to the United States District Court, the Clerk thereof, Federal Building, Los Angeles, California.

It was further stipulated that the said Deposition should be reported in Stenotypy by Jeanne Brannin, an official court reporter and disinterested person, and thereafter transcribed by her into longhand typewriting.

(Plaintiff's Exhibit No. 24—(Continued))

CARSON FRAZZINI,

having been first duly sworn, deposes and says:

Direct Examination

Mr. Monteleone: Q. Will you state your name in full.

Witness: A. Carson Frazzini.

Q. Where do you reside?

A. 415½ Vassar Street, Reno, Nevada.

Q. Are you a member of the firm of Duque and Frazzini? A. I am.

Q. How long have you been a member of that firm? A. Since 1943.

Q. And still doing business as Duque and Frazzini? A. Yes.

Q. What is the nature of your business?

A. Equipment rentals at this time, solely.

Q. During the year 1945 what had been the business of Duque and Frazzini?

A. Road and airport construction work.

Q. How long had you been engaged in that line of work prior to February 7, 1945?

A. Roughly—18 months.

Q. I presume that Mr. John McCall, attorney for the Defendants, has been interviewing you all morning, has he not? A. He has not.

Q. Well, he has interviewed you?

Mr. McCall: I object on the ground it is irrelevant and immaterial.

(Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Mr. Monteleone: Will you answer the question. He has interviewed you this morning, has he not?

Witness Frazzini: No, he hadn't exactly interviewed me. Yesterday I met him at the airport and took him to his hotel and he gave me some copies of Depositions and Court proceedings to read and I read those and I was taking them back to him this morning, and I had breakfast with him.

Q. What I'm getting at is this: Mr. Frazzini, not that anything transpired between you and Mr. McCall, but did he advise you as to the nature of the taking of this Deposition?

A. No, he did not. Yesterday afternoon——

Q. Just answer the question, if you please, without any explanation. A. No.

Q. Are you familiar with the nature of a Deposition? A. I am.

Q. There is no need of my explaining it to you?

A. I think not.

Q. Now, you recall entering into a contract with Basich Brothers Construction Company on the 7th day of February, 1945? A. I do.

Q. Now, prior to that time had you ever known any of the members of Basich Brothers Construction Company, or anyone connected with Basich Brothers Construction Company personally?

A. Yes, I knew Nick Basich previous to that time.

Q. Had you ever had any dealings with him prior to that time?

(Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

A. Yes, I dealt with him regarding the purchase of a power shovel in 1938.

Q. Outside of that you had never done any business with Basich Brothers Construction Company or anyone connected with Basich Brothers Construction Company, isn't that true?

A. Not that I know of.

Q. And you had never been in any manner—when I say you, I mean either you or your partner, Duque—interested in any way with the Basich Brothers Construction Company?

A. No, we had not.

Q. And you are not in any manner now interested in that Company? A. You mean—

Q. Outside of the litigation. A. No.

Q. Now, prior to the time that you signed the contract dated February 7, 1945, had you done any business with Glens Falls Indemnity Company?

A. Yes, we had.

Q. And for what period of time had you been dealing with the Glens Falls Indemnity Company?

A. Well, Glens Falls had bonded Duque and Frazzini on one contract prior to that time.

Q. And that was handled through what office?

A. I think actually through the San Francisco office, although our dealings were ordinarily with the Reno office, and on that particular job through the Salt Lake Office, I couldn't really say.

Q. Now, in connection with the contract with Basich Brothers with what office did you initially handle the transaction?

(Plaintiff's Exhibit No. 24—(Continued))

(Deposition of Carson Frazzini.)

Mr. McCall: I object on the ground it is irrelevant, incompetent and immaterial.

Mr. Monteleone: Through what state?

Witness Frazzini: The Los Angeles office.

Q. Had you had anything to do with the San Francisco office in connection with the matter?

Mr. McCall: I object to that as having been asked and answered.

Mr. Monteleone: Will you answer the question?

Witness Frazzini: I could not say for certain but I believe at the time that I was negotiating a contract with Basich Brothers that I called the San Francisco office to find out whether they would consider bonding that particular job as that was our procedure to obtain bonds.

Q. And that was before the contract was actually signed, is that correct?

A. That is correct.

Q. And what information did you get from the San Francisco office?

Mr. McCall: I object to that as calling for a conclusion and not relevant or material, and has no bearing on this case whatsoever.

Mr. Monteleone: Will you answer the question?

Witness Frazzini: Will you repeat the question?

(Question read by reporter.)

Witness Frazzini: A. As I remember it, I believe they told me to contact Mr. Harry Leonard of

(Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

the Glens Falls Los Angeles Office and submit to him the facts concerning the bond and they would advise me later on it.

Q. And did you do that?

A. As I remember it, I did not check with them further, but I saw Mr. Harry Leonard and he told me that he would definitely see about the bond and that was as far as I know anything about that bond until it was presented to me for signature.

Q. I see. Now, did that take place before you signed a contract—that you first saw Mr. Leonard?

A. Yes, it did.

Q. Did you tell him then what the contemplated contract was to be?

A. In dollars and cents?

Q. Yes. A. Yes.

Q. And did you tell him how you contemplated handling that job?

Mr. McCall: I object to that. It has not been testified that the bond was written.

Mr. Monteleone: Will you answer?

Witness Frazzini: Will you repeat the question?

(Question read by reporter.)

Witness Frazzini: As I remember it, I believe Mr. Leonard asked me if we had all of our own equipment to do that job and if it was suitable for the job.

Q. And what did you tell him?

A. And I think I told him that I believed it was.

(Plaintiff's Exhibit No. 24—(Continued))

(Deposition of Carson Frazzini.)

Q. Did you tell him that you contemplated renting any equipment? A. Yes.

Q. Yes?

A. (Continuing): A small amount was all we calculated to rent.

Q. You told him what equipment you had?

A. Yes.

Q. And did he ask you any other questions?

A. Just a moment, I don't believe I told him specifically what equipment we had, but I remember his asking me if we had suitable equipment to do that job.

Q. Now, do you remember when you went to Basich Brothers office to sign the contract dated February 7, 1945? And did Mr. Basich ask you about your bond? A. I do.

Q. And did you not telephone Mr. Leonard and have Mr. Basich talk to Mr. Leonard over the phone? A. I believe that is correct.

Q. And at that time Mr. Basich asked Mr. Leonard whether or not the Company would write a bond for you?

A. He was talking to Mr. Leonard on the phone, I believe for the purpose of ascertaining whether or not they would write a bond but I didn't hear the other part of the conversation so I can't say as to that.

Q. And that was before the contract was prepared? A. It was.

(Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. Now, before you signed the contract, you first contacted Mr. Nick Basich by long distance phone from Tonopah, did you not?

A. Mr. Duque contacted Mr. Basich by phone from Reno, I believe.

(Turning to ask Mr. Duque.)

Mr. Monteleone: Don't ask anyone, just testify as to what you know.

Witness Frazzini: I believe Duque contacted Mr. Basich by phone from Reno.

Q. How long was that before the contract was actually prepared and signed?

A. Oh, I would say—roughly—three to **four** days.

Q. And did you, after Mr. Duque contacted Mr. Basich, visit the site where the work was to be done? A. I did.

Q. And how much time did you spend there?

A. We spent on the job about 40 minutes.

Q. Mr. Basich wasn't along with you at the time was he? A. He was not.

Q. And when you say "we" you mean Mr. Duque and yourself? A. I do.

Q. And then after you checked the site of the work did you again contact Mr. Basich before the contract was signed? A. I did.

Q. By what means did you contact him?

A. We phoned him; from a hotel in Tucson. He was in Los Angeles.

(Plaintiff's Exhibit No. 24—(Continued))

(Deposition of Carson Frazzini.)

Q. And did you ever send him any wire?

A. We did.

Q. Now, when you came to Los Angeles, you went to Mr. Basich's office and signed the contract after it was prepared, is that correct?

A. That is correct.

Q. And it was at that time that Mr. Basich talked to Mr. Leonard of Glens Falls Indemnity Company, is that true?

A. It was.

Q. And after the contract was prepared was it signed the same day?

A. The contract was prepared over the better part of two full days and was signed on the evening of the second day.

Q. And did you take a copy of that contract to Glens Falls Indemnity Company?

A. No, I didn't.

Q. Did you ever give them a copy of that contract?

A. I do not believe that I ever did.

Q. You gave a deposition here recently in another case?

A. I did.

Q. I'll ask you if you didn't testify as follows: "Referring to the copy of the subcontract—

Mr. McCall: I'll ask Mr. Monteleone if that Deposition pertains in any way to this case.

Mr. Monteleone: No, it isn't.

Mr. McCall: I object then to this Deposition being used in any way whatsoever because it has no bearing on this case.

(Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Mr. Monteleone: I'll ask you whether or not—I'm showing you the Deposition, and asking you if that isn't your signature, Carson Frazzini? (Showing to witness.)

Witness Frazzini: I believe so.

Q. And that is a Deposition that was taken in the case of the United States of America for the F. Rondstadt Hardware Company, Baum and Adamson, and Stuckey Auto Supply Company, plaintiffs, versus Basich Brothers Construction Company and the Hartford Indemnity Company in the District Court of the United States for the District of Arizona? A. That is correct.

Q. And this Deposition was taken at Reno, Nevada, on the 31st day of December, 1946, is that not true? A. I believe it is.

Q. Now, I'll ask you if this question was not asked you: and I'm reading from page four, line 15, in which you are referring to the contract. "Q. Do you have a copy of it? A. I don't have a copy at this particular time but there are copies available either from the Glens Falls Indemnity Company, Los Angeles, or Basich Brothers who would have a copy of it, or the former attorneys at Tucson, they have a new name now, have a copy of it also, the Union had a copy of it in Tucson." Did you so testify? A. I did.

Q. Now, what copies did Glens Falls have available that you were referring to?

A. Some photostatic copies of the contract.

(Plaintiff's Exhibit No. 24—(Continued))

(Deposition of Carson Frazzini.)

Q. And when were these photostatic copies of the contract sent to Glens Falls Indemnity Company?

A. They were not sent to the Glens Falls but were made by them for their use.

Q. And when were they made with reference to the 7th day of February, 1945?

A. I could not say the date those copies were made.

Q. Well, can you say approximately when it was. Was it within a day or so after the contract was signed?

A. No, it is my guess that it would be—was possibly four months after the contract was signed. And if you wish me to say—

Q. No, just answer my question, and Mr. McCall who is representing Glens Falls Indemnity Company and with whom you have been conferring all morning can go into that matter.

Mr. McCall: Mr. Monteleone, may I interrupt the record long enough to introduce the attorney for Mr. Duque and Mr. Frazzini.

Mr. Goldwater: Goldwater. Bert Goldwater.

Mr. McCall: I'm John McCall and I represent the defendant in this action, the Glens Falls Indemnity Company, Mr. Goldwater represents Duque and Frazzini and Mr. Monteleone represents Basich Brothers Construction Company.

Mr. Goldwater: Well, may the record show that I represent Duque and Frazzini but we reserve the

(Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

right that we are not in the case, inasmuch as no jurisdiction has been obtained over Duque and Frazzini.

Mr. McCall: That's as I understand it.

Mr. Goldwater: I note a mis-statement of evidence by Mr. Monteleone. He said that Mr. Frazzini had conferred all morning with Mr. McCall. I don't think that was a correct statement.

Mr. Monteleone: Well, Mr. Frazzini called Mr. McCall at the Hotel while I was there and Mr. Frazzini came there and Mr. Frazzini and Mr. McCall came out together so I assumed that they had been conferring during the morning. That's where I based my statement.

Mr. Goldwater: You may have an argument there. Mr. Frazzini testified that he had breakfast with Mr. McCall.

Mr. Monteleone: Well, that's immaterial to the case anyhow. Q. Now, did the Glens Falls Indemnity Company request that you send them any copy of the contract before you forwarded the photostatic copy you referred to?

Witness Frazzini: A. I did not forward a photostatic copy to them at all. I loaned my copy of the contract to Mr. Bray, I believe, in Tucson while he was there and he had some photostatic copies made.

You haven't answered my question. Before that time had Glens Falls Indemnity Company ever requested you for a copy of this contract dated February 7, 1945?

(Plaintiff's Exhibit No. 24—(Continued))

(Deposition of Carson Frazzini.)

A. Actually I couldn't say that they had or had not. I don't remember of them requesting one.

Q. Did you ever have any correspondence in your file with them which would indicate that?

A. No, I have not.

Q. Did you and Mr. McCall go into your office to check your files this morning?

A. We did not.

Q. And where did you and Mr. McCall go to?

A. We went to 201 East Second Street.

Q. How long a time did you spend there?

A. Oh, I should say roughly an hour.

Q. And did you go through all your files at that time?

A. No, we didn't go through any files, and I should like to make a correction.

Q. Never mind about your correction. You mean of your testimony?

A. I do. That we did not go there to look at any files or see anything but went out there to visit the site of our present yard and office.

Q. Did you go into the records while you were there?

A. No, I showed Mr. McCall some pictures that I had of the job and that is all.

Q. Mr. McCall told you before he went there that he would like to examine these files didn't he?

A. He did not.

Q. But if I told you that he told me that, would you state that that was not a fact?

(Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

A. I would state that he did not tell me that.

Q. Now, who was your general superintendent in connection with this job in Tucson with the Basich Brothers?

Mr. McCall: I object to that as assuming a fact not in evidence. There has been nothing said about his having a General Superintendent.

Mr. Monteleone: Do you have one?

Witness Frazzini: I would say that we do not have one.

Q. Who was Clarence Hampden?

A. He was a foreman for us who may have been classified as a Superintendent to come under the union rules, but actually I fulfilled that capacity for the Company.

Q. And what were his duties at the plant?

A. During the first part of his tenure with us he over-looked the construction of a screening plant that we were setting up to produce concrete aggregates and later on I believe he may have been carried on the payroll as a General Superintendent because of union obligations.

Q. Now, he was hired by you? A. Yes.

Q. When I say "you" I mean Duque and Frazzini. A. Yes.

Q. Now, prior to the time you signed this Basich Contract, you had completed two jobs had you not, one a State job at Blythe and another one in Nevada? A. As Duque and Frazzini?

Q. Yes. A. No, we had not.

(Plaintiff's Exhibit No. 24—(Continued))

(Deposition of Carson Frazzini.)

Q. Had you completed any job at Blythe?

A. I had, yes.

Q. You yourself? A. Yes.

Q. That was not a partnership job?

A. It was carried under the name of Carson Frazzini, although Mr. Duque had an interest in the job.

Q. And was there another job in Nevada that you and Mr. Duque had completed about this time?

A. Not as a contract.

Q. What was it?

A. We worked at the Tonopah Airport, although Carson Frazzini had the contract work and Mr. Duque owned the equipment on the job.

Q. Now, who owned the equipment that was moved in on to this Basich Brothers job?

A. That was owned by numerous firms.

Q. Just state who they were. I mean the equipment that you moved in when you started the job.

A. At the start only?

Q. Yes.

A. At that time virtually all of the equipment was owned by Andy Duque and Carson Frazzini, and a man named Frank Hill from Silver Peak, Nevada.

Q. And what equipment was moved in on that job?

A. The major units were: one crushing and screening power plant; one rock screening plant; two large diesel caterpillar tractors and carry-alls; and a number of small dump trucks.

(Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. Now, who paid to have that equipment moved in on that job?

A. Duque and Frazzini paid for all of the moving that they were able to pay for.

Q. And when you say all—as a matter of fact they paid all of the bills up to the time you started your operation, didn't they?

A. No, they did not.

Q. Again calling your attention to your Deposition—(looking through Deposition) and I'll get to that—Well, I'll ask you this question, isn't it a fact, Mr. Duque—

Mr. McCall: Mr. Frazzini.

Mr. Monteleone: Frazzini, that Duque and Frazzini paid all the bills of the men until the men arrived on the job and started work on the job, and then from that point Basich Brothers took the payroll and paid it until you had completed the work, as far as Duque and Frazzini went?

Witness Frazzini: That is correct.

Q. Well, that's what I was driving at. Now when did you first operate with reference to the date the contract was signed.

A. By that do you mean when did we start producing materials, or when did we start erecting our plants?

Q. Well, when did you start erecting your plants with reference to the 7th day of February, 1945?

A. About February 11, 1945.

Q. And when did you start producing?

(Plaintiff's Exhibit No. 24—(Continued))

(Deposition of Carson Frazzini.)

A. Roughly February 25, 1945.

Q. And what plant did you first start to produce from?

A. A crushing and screening plant that we brought into Tucson, commonly called the ABC plant.

Q. Now with reference to the main job, when I speak of the main job, I mean the Davis-Monthan Air Field, where was your operation carried on?

A. At the Golab Ranch of Pantana Wash. I know it was about five miles from Tucson.

Q. And at that time did Basich Brothers have any operations of their own at this particular spot where your operation was, that was separate and distinct from your operation?

A. During the time we were in that pit?

Q. Yes. A. Yes, they did.

Q. They had a black plant there did they not?

A. They did not.

Q. The plant they had was how far from your operation?

A. Oh, about 2500 feet from one of our plants.

Q. And they—that plant—had nothing to do with your operation? A. It did not.

Q. And they also had a batch plant, did they not? A. That is right.

Q. And how far was that located from your operation?

A. That was located several hundred feet from one of our plants and possibly 400 feet from one of the plants we erected.

(Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. And that was separate and distinct from your own operation? A. It was.

Q. And were they both established before you moved in on that job?

A. No, they were possibly—pieces of them were being brought in during the first month or two we were there, but they were erected I must say after we arrived in Tucson.

Q. However, you knew they were contemplating erecting these plants at the time you signed this contract on the 7th day of February, 1945? Isn't that true?

A. That is not true in that they did not directly advise me that they were erecting them and I did not give the matter any thought although had I stopped to think about it I would have so known.

Q. Now, after the contract was signed did you give Mr. Leonard of the Glens Falls Indemnity Company any instructions as to what to do with the bond? A. I did not.

Q. You signed a bond, did you not?

A. I did.

Q. And where were you when you signed the bond?

A. At Duque and Frazzini's office at Tucson, Arizona.

Q. Now, did Duque and Frazzini establish and erect their own office at the job? A. Yes.

Q. And when was that office erected with reference to the 7th day of February, 1945?

(Plaintiff's Exhibit No. 24—(Continued))

(Deposition of Carson Frazzini.)

A. It was erected afterwards, the exact date of which I do not know.

Q. And Duque and Frazzini made all of their own arrangements in connection with the erection of that office, did they not? A. They did.

Q. They purchased their own material?

A. Yes.

Q. And supervised the erection of that plant?

A. Yes.

Q. Now, did you have an office force on the job after your office was erected? A. Yes.

Q. And what did your office consist of?

A. It consisted of one man.

Q. What were his duties?

A. His duties were to take the men's time and procure materials for our operation.

Q. And that man was hired by Duque and Frazzini? A. He was.

Q. And under Duque and Frazzini's supervision? A. Yes.

Q. Now, all of your equipment that was moved on to the job prior to the commencement of your operation, was under the direction and supervision of Duque and Frazzini, were they not?

A. Yes.

Q. And all men employed to move the equipment were hired by Duque and Frazzini and under your supervision, is that true?

(Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

A. On all the equipment that came in on the early part of the job, you mean?

Q. Yes.

A. No, they were not. Basich Brothers brought some of them in.

Q. What did Basich Brothers bring in?

A. They brought in, I believe, a motor patrol to use in their operation.

Q. To use in their operation? A. Yes.

Q. That was separate and distinct from the operation of Duque and Frazzini?

A. Well, I presume so, although it was all for the same job for the Basich Brothers.

Q. But it had nothing to do with your operation? A. The motor patrol?

Q. Yes.

A. It had nothing to do with the operation—our operation.

Q. Did they rent that from you?

A. Well, they were supposed to, although we never received any rental for it.

Q. But they were to pay you a rental for it, is that true? A. That is correct.

Q. Outside of that, all of the men moving in your equipment were under your direct supervision, is that true? A. They were.

Q. And the plants were erected, that is your plants as distinct from the Basich Brothers plant, were all erected under your direct supervision, isn't that true? A. That is correct.

(Plaintiff's Exhibit No. 24—(Continued))

(Deposition of Carson Frazzini.)

Q. And by men whom you were able to hire and fire, is that not true? A. That is true.

Q. Now, did you have a timekeeper of your own on that job?

A. In the early part of the job we did.

Q. And was that a man you hired yourselves?

A. It was.

Q. That man was under your direct supervision is that correct? A. That is correct.

Q. Now, what was the name of that man, do you recall? A. Johnson.

Q. What were his duties?

A. Johnson was supposed to check the time cards each day when he was able to and go down town and buy various materials.

Q. Now, all materials that were purchased in connection with the operation by Duque and Frazzini were under the direct supervision of Duque and Frazzini? A. That is correct.

Q. All of your purchases were only subject to your direction that is Duque and Frazzini—no one else? Isn't that true?

A. No, I wouldn't say that because most of the firms that we applied for—I believe, I do not know this to be a fact, but when asked what firm we were working for why we told them Basich Brothers and they apparently did some checking because they all notified us later whether or not the account was to be opened or not, which they all were.

(Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. In other words, that had to do mostly with your financial standing rather than anything else, is that true?

A. I presume so although our financial standing was good at the time.

Q. Now, will you state what the general nature of your operations were after you started to produce materials?

A. We had one crushing and screening plant operating that was to produce crusher run base of two different types in which Basich was supposed to take the material from the bins. We had no trucking connected with that plant and then we had several small plants working toward the production of concrete aggregates consisting of screened rock and screened sand, that were to be deposited by us at the batch plant.

Q. The first plant, as I understand it that you installed, was the crushing plant, is that correct?

A. Screening and crushing.

Q. Yes. Screening and crushing. Now, if your contract with Basich Brothers Construction Company, Mr. Frazzini—I'm referring to Article XII. It contains the following provisions: "In the event Basich Brothers Construction Company plant is used, moving in and moving out expenses will be paid by Basich Brothers Construction Company." What plant were you referring to in this contract?

A. In this paragraph, do you mean?

Q. Yes.

(Plaintiff's Exhibit No. 24—(Continued))

(Deposition of Carson Frazzini.)

A. That was a large pioneer crushing and screening plant known as the Model V-48, owned by Basich Brothers.

Q. Had you seen that plant before you signed this contract? A. No, I had not.

Q. Do you know where that plant was at the time you signed the contract?

A. Nick Basich told me it was in their yard.

Q. What yards?

A. At 800 South Fremont Avenue, Alhambra, California.

Q. Yes—you signed that contract at that place, did you not? A. I did.

Q. And did you go out to look at this pioneer plant while it was there? A. I did not.

Q. Did you ask to see it? A. I did.

Q. And why didn't you see it.

A. Mr. Popovich told me to go on out in the yard and I could look at the plant and the other equipment and upon my tour of the yard I did not see the plant in there because there was a great deal of equipment that I had looked at and from time to time I reported back to the office to see how the contract was coming along.

Q. All right. Did you, when you came back to office, ask anybody to go out and show the plant to you? A. I did not.

Q. Now, that plant was eventually installed in connection with your job, was it not?

A. It was.

(Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. And with reference to the time the contract was signed on February——

A. Just a moment—may I make a correction? No, I won't need to make that correction.

Q. With reference to the 7th day of February, 1945, when was that plant installed do you recall?

A. As I remember it, Basich Brothers started moving that plant in within a few days after the contract was signed and they started working towards its erection as it came in.

Q. Now, this plant was installed under your supervision, wasn't it? A. It was not.

Q. Under whose supervision?

A. That I can't say because we had nothing to do with the plant during the time it was being installed, but I, on the other hand, saw Mr. George Covick about and I believe it was under his supervision, and his foreman, Mr. Paul Albino.

Q. Paul Albino was hired by you wasn't he?

A. He was not.

Q. Didn't you tell Basich Brothers that you wanted Paul Albino to help install that plant because he was familiar with the installation of it?

A. I did not.

Q. All right. (Looking through the Deposition.) We'll call your attention to this statement:—(looking through Deposition still)—now you leased that plant from Basich Brothers, didn't you?

A. We did.

Q. And when did you make the lease for that plant?

(Plaintiff's Exhibit No. 24—(Continued))

(Deposition of Carson Frazzini.)

A. The date? I don't know.

Q. With reference to the 7th day of February, 1945, was it before or after that that you leased the plant?

A. It was after.

Q. How long after?

A. Oh, in round figures, I would believe it to be—roughly—two or three full months.

Q. And what were the terms of the lease? Was it verbal or written?

A. It was originally a verbal agreement which I believe was later confirmed by a letter from Basich Brothers, setting a rental rate.

Q. Do you have that letter here, Mr. Frazzini?

A. I do not.

Q. Then you and Mr. McCall were at your office this morning. Did you make an investigation to see whether or not that letter was available?

A. We did not.

Q. When did you last see that letter?

A. I can't say that I have seen it since the time of the job, although I know one was written, because—

Q. Never mind about the reasons, just answer the question. You're only encumbering the record.

A. Very well, Mr. Monteleone.

Q. Can you give us the terms of that lease that you had with Basich Brothers in leasing this pioneer plant?

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

A. On the original agreement with Mr. Basich, the plant was to be leased under a rental figure of 10c per cubic yard computed upon the amount of concrete poured, but before or shortly afterwards, Mr. Basich informed us that we would have to take his crew including Mr. Albino in order to get the plant.

Q. Didn't he tell you that you had to get the crew in order to install the plant?

A. He did not. He installed the plant.

Q. Now, under whose operation—whose supervision, was that plant operating?

A. At that period?

Q. During the operation while you were on the job.

A. In the early first few days of its operation, Mr. Basich operated, and then we took it over.

Q. And under whose supervision was it done then? A. After we took it over?

Q. Yes.

A. He forced us to take Mr. Paul Albino who was his man, as the plant foreman.

Q. I'll show you, reading from your deposition again. A. Very well.

Q. I'm commencing on page 7, reading from line 15 through no, it's line 25: "Q. Now, on the job which Duque and Frazzini had near those of the pits sites, who was in control or charge? That is the job of taking out the rock and the subsequent crushing and screening.

A. For our Company?

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. I mean who was in charge under this contract which you had with Basich Brothers?

A. Well, I presume I would be construed as being in charge of it because I was on the job all the time, although we had foremen and one superintendent, but we received our orders as to the production requirements and type of grading and so forth—daily from Mr. Kovick of Basich Brothers.

Q. He was their engineer or superintendent?

A. He was the superintendent for Basich Brothers.

Q. Well, did he have control or charge of your plant, or did he simply give you orders of what size material and the amount of material and such that they wanted.

A. Well, he gave us the orders for the production of the different sizes and the amounts from time to time.

Q. And you adjusted your work according to those orders?

A. Yes.

Q. And he designated the size and the materials that you were to use?

A. Yes.

Q. Now, who was in charge of the employees who worked in the pits on this equipment which you stated Duque and Frazzini brought to the job, the crushing and screening plant and the motor?

A. Well, Basich Brothers—these employees were all on Basich Brothers payroll, although in most instances we had the right to hire and fire the employees. I think there was one outstanding case on

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

the job that we had trouble with Basich in this manner. In the original contract there was a provision under which I rented the gravel and screening plant from Basich Brothers. After the plant was on the job and had been set up as a standby for Duque and Frazzini we were then told that to use it we had to hire their plant foreman whose name was Paul something—I can't think of it at the moment although I could get it—and one day when we had given him orders to shut that particular plant down and lay men off and he did not do so but rather he went to the Basich Brothers superintendent, Mr. Kovick, for his orders and he kept these men on the payroll against our will, but other than that one incident we were able to hire and fire the employees on the job.

Q. How about the directions to the employees and the orders to them?

A. Well, those were given by men that we hired and fired and were orders from us, that is Duque and myself.

Q. The orders and directions were given by your superintendent and foremen working for Duque and Frazzini?

A. No, they were not employees on the payroll of Duque and Frazzini they were all in the employ of Basich Brothers. It was a complicated situation, but I guess that would be correct, they were given by men whom we were able to hire and fire.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. You would say that all of the men on the job operating were subject to your control? and direction?

A. They were supposed to be, yes, although they were paid by Basich Brothers, yes.

Q. Did you so testify? A. I did.

Q. And you are sure those statements are correct? A. I believe them to be correct.

Q. So that the only incident you had where there was any question about Basich Brothers interfering was at the time you ordered the plant shut down and Kovick ordered the men to go back to work, is that true?

A. Only insofar as the employees are concerned.

Q. I'm talking about your employees.

A. As far as the employees are concerned, yes.

Q. Now, who hired the men on this crushing plant? A. You mean the pioneer plant?

Q. That is right.

A. Basich Brothers Construction Company hired them.

Q. Well, when were they hired?

A. Early on the job they were hired by Basich and put to work erecting a plant for him. Apparently we knew nothing——

Q. I'm not talking about the—erecting the plant. I'm talking about the operation of the plant—under whose supervision was the pioneer plant being operated? A. After we leased the plant?

Q. That is correct.

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

A. Mr. Paul Albino, who in turn was under Mr. Duque's orders and mine as we were the general superintendents.

Q. So that Mr. Albino, in connection with the operation of the pioneer plant, was taking orders from you, wasn't he?

A. He was supposed to be, yes. He also took orders from Basich.

Q. Never mind, we'll get to that later on. You'll have plenty of time to go into the matter, or your attorney, Mr. McCall, may be able to go into the matter later on. Now, before the pioneer plant was installed, had you installed any other plant outside of the crushing plant?

A. We were working on the installation of an adjoining screening plant.

Q. And that carried on its operations right along?

A. No, it did not prove to be very successful.

Q. Now, did you have the sand plant erected?

A. We did.

Q. Was that before or after the pioneer plant?

A. That was in the process of being erected while the pioneer was being erected.

Q. And that was under your own supervision?

A. That was.

Q. Now, as the men were working in connection with your job from the time you first started your operation, as I understand it, you kept the time cards of the men, is that correct?

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

A. Do you mean Duque and Frazzini or myself personally?

Q. Duque and Frazzini. A. Yes.

Q. Did you have a man specifically authorized to do that?

A. During the major part of the job Mr. Duque and myself tried to check the time cards each day.

Q. And after the time card was prepared and checked, what did you do with the time card?

A. We kept them.

Q. Kept them where?

A. We kept them at our office.

Q. And what was the man's name who had charge of your office?

A. At that particular time Mr. Duque and myself were taking care of the office.

Q. Now, were those cards kept in the regular course of business?

A. What do you mean by that?

Q. In the regular course of your operations?

A. Yes.

Q. And did you keep a time card for the time that each man worked?

A. I could not say, for sure, but I believe Mr. Albino turned his own time card in and those of his employees, direct into Basich Brothers, although I cannot be sure on that.

Q. You're not going to swear to that, are you?

A. As a matter of fact I'm not because I simply do not remember.

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. Now, Mr. Basich—when I say Mr. Basic, I mean Basich Brothers Construction Company—had his own office did he not? A. They did.

Q. And that was about five miles away from your office, is that true?

A. Oh, about four, roughly.

Q. Now, did you list correctly, as far as you have been able to determine from your general supervision, the exact hours that every man worked in connection with your operation?

A. Personally, do you mean?

Q. I mean under your general supervision.

A. I believe we did although I wouldn't say for sure as I didn't make up any time sheets for Basich that I remember of.

Q. Now, in your opinion, were these men necessary in connection with your operation?

A. They were.

Q. And how were the wages of these men fixed?

A. The rates were set by—as I understand it—by Mr. Kovick of Basich Brothers Construction, with the local unions.

Q. As a matter of fact the rates were set by the Federal Government, isn't that true, in connection with the Basich Brothers Construction, in the local unions?

A. Only the minimum rates, I believe.

Q. Well, were you paying anything beyond what the unions called for?

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

A. No, but I believe the union rate was in excess of the government rate although I have never checked that for sure, it usually is.

Q. Did you give the unions a copy of your contract with Basich Brothers Construction Company?

A. I did.

Q. And when did you give them a copy of that contract?

A. I would say roughly that it would be about between the 15th and 17th of June.

Q. Well, did you make arrangements with the unions prior to that time?

A. No, I—for what purpose?

Q. Well, did you discuss the matter of rates with the unions prior to that time?

A. I did not.

Q. Now, who took care of all of your equipment, I mean the equipment generally including the pioneer plant of Basich Brothers in connection with repairs?

A. Are you referring specifically to the pioneer plant?

Q. No, I'm referring to all plants. Do you want to draw any distinction?

A. Yes, I must, because they were not all maintained by us. The small crushing and screening plant that we brought in, the sanding plant, and another screening plant that we erected, were all maintained by us, but the pioneer plant was maintained by Basich Brothers, I should say most of the repairs were carried on by us.

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. Well, as a matter of fact, all of the repairs on all of your equipment was under your general supervision, was that not true?

A. On our own equipment?

Q. Yes. A. Yes.

Q. Did Basich Brothers ever make any suggestions to how you should repair your equipment?

A. Not our own personal equipment.

Q. Was it not one of the provisions of the leasing of the pioneer plant that required that necessary repairs should be made by any particular man?

A. I do not remember that ever being discussed specifically.

Q. Did you have available anyone who is competent of operating the pioneer plant?

A. Yes, we did.

Q. At the time that Albino was foreman did you

A. We did.

Q. You knew that Mr. Albino understood the operation of that plant, didn't you?

A. Mr. Basich told us he did.

Q. Well, you found nothing to the contrary did you?

A. No, I would not say that we did other than that he would not obey our orders all the time.

Q. Now, all of this equipment operated under your direct supervision, is that not true, all of the equipment on the job? A. No.

Q. I mean in connection with the job that Duquoin and Frazzini had with Basich Brothers.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

A. I would more specifically say that all of our own equipment operated under our orders at all times.

Q. Well, I'm going to call your attention to this same Deposition on page 12, commencing with line 17: "Q. Now, who took care of your equipment which you had brought down for Duque and Frazzini on the job?

A. I presume you mean by that, under whose direction or whose supervision it was under?

Q. Yes, under whose supervision and who gave it care and repair?

A. Well, the equipment worked directly under my supervision and Mr. Duque's and during the tenure of the job we had we had various mechanics on the job who repaired it, but directly under our supervision." Is that correct?

A. That is correct.

Q. Who hired these mechanics?

A. We did.

Q. And they were under your direct supervision, is that not true?

A. They were.

Q. Who arranged for the purchase of any parts of equipment or any tools that you required while you were on the job?

A. In most instances we arranged for it and in some instances Basich Brothers arranged for it.

Q. What instance did Basich Brothers arrange for it?

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

A. There were a number of instances, but a particular among the major items they furnished us with, there was one item I remember offhand consisting of a 24" conveyor belt some 125' long, roughly valued at \$425.00.

Q. That was charged against you, was it not?

A. That I cannot—

Q. In other words, they happened to have the belt in their storeroom and arrangements were made to procure it from Basich Brothers, is that not true?

A. I believe not.

Q. You don't know as a matter of fact, do you?

A. I couldn't say absolutely but I believe it was shipped from some company in Los Angeles.

Q. Did you discuss the matter with Mr. Basich before it was shipped?

A. I don't remember whether I discussed it with Mr. Basich or not.

Q. Did you discuss the terms upon which it was to be acquired?

A. No, I did not.

Q. And did you make any request for that conveyor belt?

A. I did.

Q. And that was before it was shipped, is that correct?

A. That is correct.

Q. And who did you make that request of?

A. I believe Mr. Kovick knew—I don't remember specifically.

Q. Now, what other instances did you have in mind that you mentioned?

A. There were several other instances, but I

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

believe in the case of some teeth for a power shovel that we were operating, I believe that Basich purchased those.

Q. And then charged you with them, is that not true?

A. I do not ever remember being charged with them.

Q. You had no contract with Basich Brothers whereby he was to furnish you free of charge with those teeth, did you? A. I did not.

Q. Now, while the pioneer was being operated by you—you speak of this man Albino. Can you tell me of any other man by name, whom Basich Brothers supplied to operate that pioneer plant?

A. I don't believe they ever even suggested anyone else. In fact that was a condition upon which we leased the plant is that he be put in charge of it.

Q. And you were to be charged a salary, weren't you? A. I believe so.

Q. And all men who worked on that job were to be charged a salary for operating that plant under your lease agreement with Mr. Basich, isn't that true? A. I believe so.

Q. And all those men who were working on the pioneer plant while you were operating at that time at that particular plant, were enumerated in your time card every night, isn't that true?

A. I do not know for sure but I do not believe that was correct.

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. You don't know? A. I do not know.

Q. Incidentally, what did you do by the way with the time cards after they were prepared by you or under your supervision?

A. Segregated them into boxes for time periods.

Q. And did you prepare a payroll from those time cards? A. I did not do so personally.

Q. Who did?

A. I believe that if any were prepared that they would be by Mr. Duque who was preparing the payroll cards.

Q. I see. And when those payroll cards were prepared by Mr. Duque, what was done with those cards?

A. They were put into boxes and kept in our office.

Q. Were any of them given to Basich Brothers Construction Company?

A. Not to my knowledge.

Q. Do you know what became of those payroll cards? A. I do.

Q. Where are they?

A. I gave them to Mr. John Bray of the Glens Falls Indemnity Company for checking and auditing.

Q. When did you give these payroll cards to Mr. Bray?

A. As near as I can remember, I would say some time last fall.

Q. What time last fall?

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

A. The exact month and day?

Q. Yes. A. That I don't know.

Q. When did you first meet Mr. Bray with reference to the 7th day of February, 1945?

A. I met him after that date.

Q. How long after?

A. That I do not know but I would guess possibly two and a half months or longer.

Q. At that time where did you see him?

A. At our office in Tucson.

Q. And how long did he remain in Tucson, if you recall?

A. That I do not recall, but I believe he was possibly there one day or possibly two days.

Q. Now, did you show him the payroll cards at that time?

A. I do not remember if he wanted to look at them, but had he wanted to he would have had full access to them.

Q. You had a man in the office at that time, is that correct?

A. No, we had no one in the office at that time but ourselves.

Q. I see. Now, who kept those payroll cards?

A. Mr. Duque had a good deal more to do with them than I did although we both were trying to check the time to be sure that each employee had worked those hours each day.

Q. Now, did you have a record of all of the equipment you were renting at that time when Mr. Bray first called at the office? A. Yes.

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. And did you have a record of all purchases which you had made in connection with your operations in connection with this particular job?

A. I would say virtually all of them.

Q. And did you show those records to Mr. Bray?

A. We did.

Q. And did Mr. Bray make any comments about them?

A. None that I can remember.

Q. Did he take any notes down, do you know?

A. None that I can remember. I can't say, but I believe he did make notes, but I couldn't say what was in them.

Q. Would you state that the first occasion that Mr. Bray called at your office was about the 11th of April? A. It could have been, yes.

Q. And do your records show, as you observe from your best knowledge, a correct situation of the amount of your payroll and the amount of rentals that had obligated yourself, or paid, or the amount of material you had bought in connection with your operation?

A. As far as the payrolls were concerned, I don't remember if we had, well—I do remember that we hadn't totaled them that we wouldn't have known what the total amount of payrolls which had been paid, although we had a record of the hours, the time cards there, and we had records of virtually all of the equipment that we had purchased, and Mr. Bray I do believe wanted a general outline of

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

our financial situation and standing on the job at that time and we gave that to him as close as we were able to do.

Q. Now, in your opinion, were the rentals that you were paying for this equipment the reasonable rental of the equipment that you were using?

A. I do not believe—are you referring to equipment that we were renting from Basich?

Q. I'm referring to various equipment that you were renting outside of Basich Brothers?

Mr. McCall: I object to that as calling for a conclusion. The witness does not have before him any statement of any charge against him by Basich Brothers.

Mr. Monteleone: Well, you know what the terms of your rentals were of your equipment before you rented them?

Witness Frazzini: A. Not in all instances.

Q. Well, were there any instances which you didn't know anything about?

A. If we were in doubt we would ask to be sure to see if they were within the O.P.A. rental rates, and if they were we would accept them.

Q. And did you ever have any of them that were not within the O.P.A. rental rates?

A. I do not know of any specifically.

Q. And was that equipment that you were using on your job either rented or which you owned and operated, or any material which you purchased, necessary in connection with your operation?

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

A. All that we rented and all the material we bought was necessary.

Q. And were they all based upon a reasonable price insofar as you know?

A. As far as I know they were.

Q. Now, you knew your payroll was being paid directly by Basich Brothers, didn't you?

A. I did.

Q. You have a provision in your contract, have you not (looking through contract) referring to Article 21, Subdivision 3: "Duque and Frazzini to submit weekly payrolls by Monday night of each week for the previous week which closes on Saturday at midnight to Basich Brothers Construction Company. Basich Brothers Construction Company to pay labor, compensation, insurance, public liability, property damage, Arizona employment insurance, Federal Old Age, Excise Tax on Employers and any other insurance on labor and charge same to Duque and Frazzini, which amounts are to be deducted from amount earned." Are you familiar with that provision? A. I am.

Q. Did you submit those payrolls to Basich Brothers? A. I believe we did.

Q. Who did?

A. Early in the job I believe Mr. Johnson did.

Q. And who was Mr. Johnson?

A. He was our first and only timekeeper who was on the job a short time. Beyond that point, any that were submitted I believe were submitted by Mr. Duque.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. I see, and those payroll records were correctly prepared, were they not, under your general supervision?

A. They weren't under my personal supervision.

Q. I mean under your supervision from time to time.

A. If Mr. Duque signed them I presume he would have been.

Q. And they were all prepared in the ordinary course of your business, were they not?

A. I would think so.

Q. And they were paid by Basich Brothers?

A. They were.

Q. Did Basich Brothers ever pay you, either you or Duque, any money whatever in connection with the operation?

A. Not to my knowledge.

Q. Now the workmen's compensation—the men you had working for you, the actual premium, was paid by Basich Brothers, was it not?

A. I suppose so. I did not know anything about that.

Q. Now, when you started your operations, did you have sufficient money at that time to meet your payments?

A. Yes, we did.

Q. How much money did you have in the bank at that time?

Mr. McCall: I object——

Witness Frazzini: A. I couldn't say offhand without checking.

Mr. Monteleone: Q. And what bank did you carry your money in at that time?

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

A. I believe the First National Bank of Tonopah, Nevada.

Q. I see. How much money did you have in the bank at that time?

A. I just got through telling you that I do not know, Mr. Monteleone.

Q. Now, when Mr. Bray visited your office on this first occasion, did you tell him that Basin Brothers was paying your payroll?

A. I don't remember if he asked us or not, and I do not remember of telling him so.

Q. You don't remember of telling him so?

A. I do not.

Q. Did you have, at that time, when Mr. Bray first came to the office, a record of the amount of your productions?

A. No, only an approximate amount, that was arrived at by counting some loads that are binned from day to day.

Q. In other words, you had records of the approximate amounts, is that correct?

A. I believe a general approximate amount.

Q. And did you give Mr. Bray that approximate amount? A. I believe so.

Q. And at that time did your record show that you had sufficient money to meet the payroll and your rent on the appliances in connection with your operation?

A. I don't remember specifically that to be so, but I'm pretty sure they would have showed that yes.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. That was the situation, is that right?

A. I believe so.

Q. And did you present that to Mr. Bray at that time?

A. I don't believe so.

Q. You don't believe so? You wouldn't state whether or not you did, would you?

A. No, I wouldn't because I do not remember.

Q. But Mr. Bray at that time was particularly interested in finding out your financial condition, wasn't he?

A. Yes, he was.

Q. Now, what was the method adopted at the time you commenced your operation and removed your material after you had produced it. How was it done. Was it stock pile or was it dumped in trucks?

A. I presume you are referring to the first screening and crushing plant that we set up?

A. That is correct.

A. It was removed in trucks from our bin to a stock pile.

Q. Yes, and then what was done with it after it was removed from your bin to a stock pile?

A. Mr.—I should say Basich Brothers Construction Company removed that material from the stock pile to the field.

Q. Now, when you removed it from your bins to the stock pile was there any method that you had adopted in determining the quantity of material so stock piled?

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

A. Yes, we kept a rough truck count each day of the number of loads dumped in the stock pile and approximately what measurement we thought each truck was carrying.

Q. And did you make a record of that?

A. I believe at that time I had a record of it.

Q. And did you give that record to Mr. Bay when he first called at your office?

A. No, I did not give him the records although I may have given him an approximation of these totals.

Q. And that was—your approximate totals were arrived at by including the truck loads as you have already indicated, is that correct?

A. That is correct.

Q. And some of the material was removed, dumped in trucks of Basich Brothers Construction Company directly from your bins, isn't that true?

A. Yes, that is true.

Q. And some stock piled, as I understand it, is that correct?

A. That is correct.

Q. Did you first begin to stock pile before you followed the method of dumping the material?

A. We did.

Q. And how long did that operation continue?

A. Oh, I would say that it possibly continued the better part of two weeks.

Q. What was the reason for that.

A. Basich Brothers were not prepared to receive the material in the field at that time.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. I see. Now, up to the time that Mr. Bray first called at your plant at Tucson, could you give me an idea as to the average tonnage per day that you were producing from the time you first started your operation?

A. There were such—it would be impossible because in the first few weeks of our operation we were not too stringently regulated on the graduation of the materials and we were able to produce as high as I believe around 1100 truck yards a day in a few odd days, and a good many days over 900, but later on our production fell below that and down to, I guess, on some days as low as maybe 250 yards, or something like that.

Q. And did you present that to Mr. Bray when he came up to your place on the first occasion?

A. I did.

Q. Were you having difficulty in connection with your equipment itself?

A. Yes, we were.

Q. That was in the beginning, is that correct?

A. Yes we were having some right along. Virtually all of our equipment ran better in the beginning than later on.

Q. Now, can you fix the time when the pioneer plant was first installed?

A. No, not accurately, but it seems to me like Basich started installing the pioneer right in the very early part of March it may even have been around the first of March and that was continued right on through the whole month.

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. Now, you recall receiving a letter from Basich Brothers on the 5th day of April, 1945 in which they requested you to install equipment in order to make more production?

A. I believe we received a letter to that effect.

Q. Yes?

A. (Continuing) At least I know it was discussed by us.

Q. I'll refer to a letter dated April 5, 1945, which has been introduced in evidence in this matter, Mr. Frazzini, from Basich Brothers Construction Company to Duque and Frazzini of Tonopah, Nevada, carbon copy of which was sent to Duque and Frazzini at Tucson, Arizona, and Glens Falls Indemnity Company, Los Angeles, California, in which is stated: "Reference is made to our Contract Agreement, dated February 7, 1945, in which you agreed to commence crushing material with one plant on February 19, 1945. It was further agreed that you were to move in two plants, each capable of producing 800 cubic yards per day of suitable material. Your attention is directed to the fact that the plant did not commence work on February 19th; furthermore, to date you have not averaged 800 cubic yards of material per plant per day.

"Since we reserve the right to compel you to move in additional equipment to insure proper completion of your contract, we hereby demand that you move in additional and suitable equipment

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

order to produce the amount agreed upon in our contract." Do you recall that letter?

A. I believe I do.

Q. Now, at the time you received that letter, were you averaging 800 cubic yards of material at plant a day? A. I don't think so.

Q. Did you get any additional equipment in order to bring up that amount to the amount of material required? A. We did not.

Q. Did you discuss this matter with Mr. Bray, about the additional equipment being moved in, when he saw you on the first occasion?

A. I do not remember of discussing it with him although I probably did if we received the letter prior to that time.

Q. Now, did you see Mr. Bray, John Bray of Glens Falls Indemnity Company, again?

A. I did.

Q. And that was the early part of May, 1945?

A. It could very easily have been.

Q. Was he alone at that time?

A. If I remember right I believe he was in the company of a man by the name of Ballou.

Q. Do you know who he was?

A. Mr. Bray presented Mr. Ballou to me as being a crusher expert, that's on the production of crushed materials.

Q. And he was presented to you by Mr. Bray as Mr. Ballou, who had come or had been sent there. Did Mr. Bray tell you who had sent him there?

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

A. He did not, he told me I believe that Mr. Ballou was living in Phoenix and I did not question him beyond that point.

Q. How long did Mr. Bray stay at your Tucson plant on that occasion? A. Several days.

Q. When you say "several days" how many days would you state?

A. Oh, I would say—two or three days.

Q. And during that time did he examine any of your records? A. Mr. Bray?

Q. Yes. A. I believe he did.

Q. And what records did you have in your office at that time which you recall Mr. Bray's examining?

A. He went over the amount of bills that were owed, beyond that I don't remember, but I believe that was one of the principal things that he was wondering, was how much money was owing by us.

Q. And did he go into the matter of the amount of production you had produced up to that time?

A. Yes, he did.

Q. And at that time did your record show that you had spent more money in connection with your bills than you had earned from your production?

A. I am positive that it did.

Q. Then did Mr. Bray take down any notes?

A. I'm certain he did.

Q. Did your records show all rentals that were due on the equipment?

A. As a matter of fact we had had very few billings for any rentals up to that date, so the

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

were very incomplete on that score although in my personal diary I had credited most of the delinquent rentals.

Q. By the way, you mention about your time records being kept in your files, do you have an office here now? A. We do.

Q. Did you preserve those records?

A. We did.

Q. When did you last see—pardon me, Mr. McCall had made a request that we take a little recess now, so I think it's a good idea.

(A recess was then taken at 3:10 p.m.)

After Recess

Mr. Monteleone: When did you last see those records?

A. Do you refer to the time cards?

Q. That is right. A. Last fall.

Q. What part, the last part?

A. I couldn't say. I don't remember what month it was.

Q. Was that the time you *have* them to Mr. Bray? A. It was.

Q. And are they in Mr. Bray's office now?

A. As a matter of fact I know they are.

Q. Did you give Mr. Bray any other records other than your time cards?

A. I believe I gave him some copies of time sheets that we had.

Q. Was that after you removed your equipment from the job? A. That was.

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. When did you remove your equipment from that job?

A. We started loading it out I would say, about the 10th or 11th, well around the middle of June and I think it was all gone by the end of June.

Q. You removed all of your equipment from the job is that correct?

A. That is incorrect; we did not.

Q. What equipment did you leave there?

A. We left some—an electric motor, electric switches, belonging to Duque and Frazzini. We left some rented equipment, bins, and well, I don't remember what else specifically we left the gravel plant in their possession with the explicit understanding that they would return them.

Q. In other words, you were quitting the job at that time for good, were you not?

A. Well, Basich Brothers—

Q. Just answer the question. You were quitting the job for good at that time were you not?

A. We were.

Q. And who paid for the men and expenses in dismantling your plant and removing the same from the job when you quit?

A. Duque and Frazzini.

Q. Up to the time you moved your plant away, in your opinion as a contractor, were all those men whom your time cards show as being employees in connection with your operation, necessary in connection with the economical operation of your work?

A. They were.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. And were all the equipment that you used and all the supplies that you acquired, in your opinion as a contractor, necessary in connection with the economical operation of your work?

A. Are you referring also the pioneer plant of Basich Brothers?

Q. That is correct. A. They were not.

Q. They were not? Why?

A. During the time Mr. Albino was operating the pioneer plant there was a large amount of extra parts, repairs at that site, presumably charged to us, but we did not feel that it was required. Also, Mr. Kovick instructed certain repairs to be made on the pioneer plant over our protest that we did not feel were required.

Q. We'll get to that—Now, will you tell me what repairs were made that you did not require?

A. The biggest one was the rows of crushers—part of the pioneer crushing plant was built up at nights by a welder from Tucson on Mr. Kovick's orders and over our protest.

Q. How was that protest made?

A. To Mr. Kovick who advised us what he was doing and we told him that we did not think it was necessary.

Q. Was that before the operations started on the pioneer plant?

A. No, that was after it had started.

Q. When was it?

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

A. I could not give the exact date but I could say that probably it occurred in the latter part of May.

Q. What else?

A. That was the only large thing I can think of right now.

Q. All right. A. In regard to repair.

Q. But the pioneer plant itself was necessary in connection with your operations was it not?

A. It was.

Q. And the only objection you made was in connection with the repairs of a certain row of cashers, is that correct?

A. That was the only vocal protest that we made, although we had discussed the accumulation of materials around the plant but we did not know whether or not they were being charged to us.

Q. Well, as a matter of fact, isn't it true that before any material was sent to you that you ordered that or Mr. Duque ordered it?

A. Not to the pioneer plant.

Q. Well, aside from this one item, what other items were there that were installed in the pioneer plant that you claim was charged to you?

A. I do not know of anything actually charged to us, as we were never billed for it, but Basich—

Q. Oh, I see—during the entire time that you carried your operations from the very beginning to the end, did Basich Brothers or anyone connected

(Plaintiff's Exhibit No. 24—(Continued))

(Deposition of Carson Frazzini.)

with Basich Brothers Construction Company attempt to fire any of the men who were operating under your supervision?

A. Not that I can remember of.

Q. Now, you closed your plant down about the 19th of May, 1945?

A. What plant?

Q. Your operations?

A. We did not.

Q. Did you at any time suspend your operations from Saturday until Monday, gave instructions to suspend operations from Saturday to Monday?

A. We did on one plant.

Q. What plant was that?

A. That was the pioneer crushing plant.

Q. I see, and who gave the directions, and to whom?

A. The order was given by me to Mr. Paul Albino.

Q. I see. You had been giving Paul Albino orders prior to that time?

A. A few.

Q. Now, were you operating the other plant when you gave Paul Albino the order to close down the pioneer plant?

A. On that particular day I don't know if any other plants were running or not, although I could consult some of my notes which I have with me.

Q. Were they made up at that time, those notes?

A. These notes that I'm referring to were made daily.

Q. Did you keep a daily diary?

A. I did.

Q. Do you have that dairy here?

A. I do.

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. When was that kept? A. Daily.

Q. Was it kept in the ordinary course of your business? A. It was.

Q. From the very beginning?

A. No. No, it was not.

Q. When did you start to keep your diary?

A. April 5th.

Q. And who suggested that you keep it?

A. It was my own.

Q. It was. Why did you start on April 5th rather than prior to that time?

A. Prior to that time we did not seem to have equipment in sufficient quantities on the job to require a record of that kind being kept, but that was the same kind of a record I had kept in previous years of equipment.

Q. Now, do you have to refer to the records to determine whether or not you had not operated at all on May 19, 1945? A. I would.

Q. Do you have any distinct recollection?

A. Yes, I do have a recollection that we were operating some that day.

Q. What were you operating on that day?

A. I remember distinctly that we were operating the pioneer crushing plant that day.

Q. And outside of the pioneer crushing plant, what else were you operating that day?

A. I can say our procedure was to operate all plants that would operate mechanically unless they were broken down.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. Was your crushing plant broken down then?

A. That I do not know.

Q. Do you know whether your crushing plant was working that day?

A. I just told you that I did not know.

Q. And you left the job then didn't you?

A. At what time?

Q. May 19, 1945.

A. Do you mean, left Tucson?

Q. No, let the site of the work, not Tucson, but the site where you were working.

A. Oh, yes, I went into town during that time.

Q. Where did you go to, then, this particular time? A. I went to my home.

Q. Did you give any instructions to anyone on that job?

A. I instructed Mr. Paul Albino to lay his crew off on the pioneer crushing plant until Monday morning.

Q. Did you give any more instructions to a Mr. Hampden, your foreman?

A. I do not recall. No, I do not remember whether I did not right now.

Q. And were you on the job at that time?

A. Yes.

Q. And did you tell Paul Albino you wanted his men laid off on that job? A. I did.

Q. What did you tell him?

A. I told him that we were taking the large shovel that was feeding the pioneer plant out to

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

prospect for suitable materials that would not prove to be of such waste as those were running through the plant, and therefore to shut that operation down for the balance of that week end until Monday morning.

Q. And when you gave Paul Albino those instructions, you went to Tucson as I understand it, is that right? A. That is correct.

Q. And when did you return back to the job?

A. I came out that afternoon.

Q. I see. Now, who did you give instructions to use that shovel. What shovel did you use?

A. The power shovel.

Q. Who did you give that instruction to carry on the operations that you explained.

A. Mr. Duque gave those instructions to the operator.

Q. Did you give any instructions to this Mr. Hampden?

A. I believe that he too had instructions governing the use of the shovel for the day inasmuch as he was working the balance of the day and he was to overlook that operation.

Q. You say Mr. Duque gave the instructions. Did you give any instructions outside of Mr. Albino?

A. I may have given them to Mr. Hampden.

Q. Do you know whether you did?

A. No, I don't remember if I did or not, but I often gave him instructions.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. I'm not asking what you often did on this particular occasion. What did you do on that particular day after the pioneer plant was to be closed down?

A. I can't say for sure, but I believe I did.

Q. And then you left for Tucson, is that right?

A. That is right.

Q. And you knew at that time that Basich Brothers required material in connection with their main operation at the Davis-Monthaine Field, didn't you? A. I did.

Q. And they told you they were short of material at that time didn't they?

A. I calculated that they possibly had enough to finish pouring that day.

Q. When did you make that calculation?

A. In the morning.

Q. Did you discuss that with anyone?

A. With Mr. Duque.

Q. Outside of Mr. Duque did you discuss that calculation with anyone connected with Basich Brothers? A. I do not believe so.

Q. All right. Now, was Mr. Duque at the plant when it was closed down or was he down town?

A. He was.

Q. And do you know originally how long he remained there? A. I do.

Q. How long did he?

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

A. He left for town with me at the same time—somewhere between 9:30 and 10:00 o'clock in the morning and he went into Tucson with me.

Q. So that you and Mr. Duque left the site of the operation that morning didn't you?

A. We did.

Q. And you gave Mr. Albino instructions not to operate that plant, is that right?

A. I did.

Q. Then you received the telephone call later on, did you not? A. I did.

Q. From whom did you receive that telephone call? A. From Mr. Kovick.

Q. I see. Was Mr. Hampden on the job at that time? When you left? A. Yes.

Q. Did you give him any instructions or Mr. Duque, your partner, give any instructions to Mr. Hampden?

A. I won't say exactly how he received his instructions, but I believe he was given some by both Mr. Duque and myself while we were together.

Q. What instructions did you or Mr. Duque give Mr. Hampden before you left for Tucson?

A. I believe we outlined his program for the balance of the day with work we wished prosecuted.

Q. What did you tell him in reference to the work? A. I would guess—

Q. I don't want any guesses, I want you to state from your best recollection.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

A. From my best recollection I would say that he was instructed to have the shovel prospect for gravel and he was advised of the reason for the pioneer crusher being shut down, and no doubt if anything else was running he was instructed as to what to do with that operation.

Q. Who indicated to him where he was to operate that shovel that day?

A. I would say that Mr. Duque probably did that.

Q. Do you know whether he did?

A. I would say that he possibly did.

Q. Were you there at that time?

A. Yes, I was with him that morning.

Q. Well, how did it happen that Duque gave the instructions instead of you?

A. Mr. Duque and I were quite full of instructions and often issued them to any employees we desired.

Q. When you and Mr. Duque left the job, did you expect to return back that day?

A. Oh yes.

Q. When did you expect to return?

A. As soon as we had finished our lunch at 1:00 o'clock.

Q. You left at 9:00 o'clock?

A. Between 9:30 and 10:00 o'clock.

Q. Did you give Mr. Hampden any instructions where he was to move or store that over burden material which he was to remove with the shovel?

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

A. We were not removing over burden material.

Q. What were you removing?

A. We were not removing anything. We were excavating trenches prospecting for suitable material.

Q. Did you and Mr. Duque indicate to Mr. Hampden where he was to start to prospect for material? A. Yes.

Q. And where did you indicate to Mr. Hampden that he was to start to prospect for additional material?

A. A very slight distance up the road toward Tucson, from our pit, but on the Golab property, which was under lease to Basich Brothers.

Q. How far?

A. My guess in footage is that it was possibly from the edge of the other pits we were working in not over 300 feet.

Q. Did you give Mr. Hampden any instructions as to when he was to start that operation?

A. As I remember it, the shovel was in the process of being removed when we were talking to Mr. Hampden.

Q. Who was moving the shovel then?

A. Let's see—I can't give his name but he was the regular shovel operator for that machine.

Q. Did you give Mr. Hampden any instructions as to whether he was to immediately start that prospecting operation that morning? A. Yes.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. And then you left at 9:00 o'clock, is that right? A. Between 9:30 and 10:00 o'clock.

Q. And did you tell Mr. Hampden how long he was to operate on that job?

A. Oh, in connection with those prospecting operations? I couldn't say definitely, but I would guess that we did give him definite instructions to operate all day and on Sunday. In fact, I recollect that he wanted to work through Sunday in order to open them up.

Q. Isn't it a fact that you told Mr. Hampden to lay off all the men from any operation until next Monday? A. No, sir.

Q. You did not? A. I did not.

Q. Then Mr. Kovick rang you up, did he not?

A. He did.

Q. And he told you that Basich Brothers were short of material? A. He did.

Q. And he told you that the Government engineers were demanding that the work proceed without delay, didn't he?

A. I don't remember of him saying that.

Q. Did you ever see Mr. Woolums, the resident engineer of the Government, at your pit?

A. Yes.

Q. And did he ever make any statement to you that you were not producing sufficient material to carry on the operations on the main project?

A. He did.

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Mr. McCall: To which I object, as irrelevant, and immaterial, as Mr. Woolums had no part in this contract between Basich Brothers and Duque and Frazzini.

Mr. Monteleone: Q. If you will read your contract on Article I, which provides as follows: "The Subcontractor shall furnish all materials, supplies and equipment, except as otherwise herein provided, and perform all labor required for the completion of the said work in accordance with all provisions of the original contract and plans referred to therein, all of which are hereby made a part of this agreement, and under the direction and to the satisfaction of the Principal's engineer or other authorized representative in charge of said work." Mr. Woolums was the Government engineer in charge of this project, wasn't he? A. He was.

Q. And when did he start to make comments to you that you weren't producing or prosecuting your work sufficiently?

Mr. McCall: We object to that as calling for a fact not in evidence.

Mr. Monteleone: Did he tell you that you were not producing sufficient material for the work to be expeditely prosecuted on the main project?

Witness Frazzini: A. He did not.

Q. Did he ever make any complaint to you?

A. He did.

Q. When did he first make any complaint to you?

A. One of the first days that our screening plant

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

that had been set up to pour concrete aggregates was running negligible Mr. Woolums came over in company with other engineers and made tests upon the material and indicated that it was improper aggregate and not clean enough to meet their specifications.

Q. When was that, would you say?

A. I would guess it was around—oh, sometime early in April.

Q. All right, then, did he many any other complaint later on? A. Not to me.

Q. Did he make any complaint about your operation to anyone in your presence?

A. No, he did not.

Q. Do you know a Mr. Mitchell?

A. No, I do not.

Q. Was there any Government inspector at your job? A. Yes, several of them.

Q. Did they ever make any complaint to you?

A. Yes, they did.

Q. And was that directly made?

A. Not directly but when the material varied from the required specifications they immediately went to see Basich or Mr. Kovick or sometimes they came to us to try to get it corrected.

Q. Now, what time of the day did Kovick ring you up?

A. That I couldn't say, but I would guess possibly between 10:00 and 11:00 o'clock.

Q. And where were you at that time?

A. At my home.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. And where was Mr. Duque?

A. As far as I know at his home.

Q. Now, as I understand it, you did not return to the job until that afternoon?

A. I believe that's correct.

Q. Did you see Mr. Hampden at the job when you returned? A. I think so.

Q. Are you sure?

A. No, I'm not positive, but let's see, I would like to say that I'm almost certain I did see Mr. Kovick.

Q. You have no distinct recollection of seeing him? A. No, I don't.

Q. Now, what did Mr. Kovick tell you over the phone when he phoned to you that morning?

A. He told me that they were short of material in the stock pile to complete or pour that day and that they would like to have us start up the plant again and produce materials and I told Mr. Kovick that the materials had been produced for the last few days were coming from such poor base material that it was impossible to go on with that grade of stuff and that we had decided to shut the plant down in order to prospect for some good gravel which we felt could be found by that method and that we proposed to start up again Monday morning.

Q. Let me ask you this: How long was it after you left the job before Mr. Kovick telephoned to you?

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

A. In minutes I couldn't say, but I would guess possibly an hour.

Q. Or more?

A. It could have been very easily.

Q. Now, during that period of time, from the time you left the job until Mr. Kovick telephoned to you, did you make any investigation to determine whether or not this shovel and its operators were prospecting for additional materials?

A. No, it would not have been possible for us to do that, but that was Mr. Hampden's function, to see that that shovel worked.

Q. Well, do you know whether or not it had been working during that period of time?

A. I know positively, or knew positively later, that it had because of the work that I saw done.

Q. Did you talk to Mr. Hampden about it?

A. I think so.

Q. And you'll state positively that that shovel worked in prospecting for additional material from the time that you left the job when you ordered the plant to shut down until up to the time you heard from Mr. Kovick, is that what I understand your testimony to be?

A. No, you understand incorrectly. That work was done between the time that I left the job and returned to the job that afternoon.

Q. Oh. What work did you observe was done by the steam shovel between that time and the prospecting for additional material?

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

A. I could see where he had moved the machine out of the main pits and traveled across to the deposits of gravel strata that had been picked out by Mr. Duque, and where he had dug in and exposed the gravel face.

Q. Where was the shovel at the time you came back with reference to the pits where this excavation work took place that you observed?

A. It was within the immediate point of the pits, I believe, that it was near some of the trenches, if I remember right.

Q. Near some of the trenches? A. Yes.

Q. It wasn't at the pioneer plant then?

A. I do not believe it was.

Q. All right. Now, when you got back, was that the only reason you ordered the pioneer plant that you have already testified to?

A. That was the only reason.

Q. Now, when you got back to the pioneer plant in the afternoon, was it operating?

A. I don't remember if it was or not, but I do not believe it was.

Q. Do you know whether it operated at all until the next Monday?

A. I don't believe it did, although I don't recollect.

Q. Now, that was the only time, as a matter of fact, that you and Basich Brothers or any representative of Basich Brothers, had any discussion about your method of operation, isn't that true?

A. I should say not.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. All right. I'll call your attention to your Deposition so that your memory may be refreshed.

Mr. McCall: May it be understood that we object to all of this Deposition, which as I understand does not pertain to this particular case. This Deposition which is being used by Counsel, which I have never had the opportunity of seeing and which Counsel has refused to let me see prior to using it.

Mr. Monteleone: Well, Mr. McCall, the Deposition is of this Witness, is sworn testimony. I just wanted to know—I just wanted to get the facts and I don't think that you objection to my getting the true facts and true statements from this witness?

Mr. McCall: I'm only trying to confine the questions to this particular suit and not to any other litigation.

Mr. Monteleone: All right. Are you concerned about my getting the true statement from this witness?

Mr. McCall: No, what we are after are the true facts, but since I have been refused access to the Deposition that's being used, I question the facts.

Mr. Monteleone: Well, the witness is the best one to question the facts. It is a signed Deposition by him that I'll show you right now, that you may examine if you desire.

(Counsel indicating Deposition.)

Mr. McCall: I just object to its being used. It's all immaterial.

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Mr. Monteleone: You don't care to see it now?

Mr. McCall: You're using it, aren't you Mr. Monteleone? I'm not depriving you of its use.

Mr. Monteleone: I'll get to that (looking through Deposition). Do you recall, Mr. Frazzini, your prior testimony where I called your attention to part of your Deposition in which you stated that the only time you had any controversy with Basich Brothers was on this particular occasion, well, no I'll withdraw that (looking through Deposition). No, here we are. Reading from page 9: this is your answer to a question was this: "I think there was one outstanding case on the job that we had trouble with Basich with in this manner, that originally in the original contract there was a provision under which we rented the gravel plant belonging to Basich but after the plant was on the job and had been set up as a stand-by for Basich we were then told to use it, that we had to hire his plant foreman whose names was Paul something—I can't think of it at this moment, although I could get that—and one day when we had given him orders to shut that particular plant down and lay the men off he did not do so, but rather he went to Basich's Superintendent Kovick for his orders and kept those men on our pay-rolls against our will but other than that one incident we were able to hire and fire the employees on the job." Did you so testify?

A. I did.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. Now, were you referring in this Deposition to this particular incident we are now discussing?

A. I was not.

Q. Well, what other time did Kovick give any orders to your men not to work?

A. I did not say that he ever gave any other orders to our men.

Q. Did he ever give any such orders that you know of?

A. Are you referring in substance to this situation whether we ever had any trouble with Basich as concerning labor or over any phase of the job, may I clarify that?

Q. I'm confining myself to the particular labor incident you had referred to in your Deposition when you stated that: "one day we had given orders to this man Paul to shut down the plant and lay the men off and he did not do so," I want to know what particular incident you are referring to in this Deposition.

A. In which Deposition, this one?

Q. In the Deposition that was given sometime ago that I previously called to your attention in the case pending in the District Court of Arizona.

A. Mr. Monteleone, I do not wish to appear argumentative, but that record speaks for itself and points out the incident described therein (indicating Deposition). Does that answer it?

Q. No, it doesn't. I want to know what particular incident you were referring to in this Deposition

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

that was given by you on December 31, 1946, when you referred to the fact that one day when you had given orders to shut down that particular plant and lay the men off Palu did not do so. What incident were you referring to then?

A. The one therein described where I ordered Mr. Albino to lay his crew off until Monday morning and in which he did not follow my orders but followed Mr. Kovick's orders.

Q. Well, that's the same incident that you're testifying to now, that I have been calling your attention to, which was on May 19, 1945.

A. I presume it was.

Q. Well, I'm not asking whether you presume or not, I'm asking whether or not it is a fact.

A. I assume it to be a fact because I didn't have the incident associated with any particular date, but if you say that's the date, I'll say that it is true.

Q. All right. Now, how many times did you see Mr. Bray from the Glens Falls Indemnity Company at the job while you were operating?

A. I would assume that you mean how many visits, on the different visits to Tucson, did I see him? Would that be correct?

Q. Yes.

A. I don't know, but I believe about three, it could have been four, but I think just three.

Q. Did you ever write any report to the Glens Falls Indemnity Company while you were operating?

A. What kind of a report?

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. I mean any kind of a report or letter.

A. I couldn't say whether I did or didn't because there are none that come to my mind. But, had they asked for any information I would have supplied it.

Q. But each time that Mr. Bray called at your office did you explain to him all of your reports, showing payrolls, tools, and purchase of equipment and the amount of production?

A. No, we did not. He would only ask for certain facts or records and we were glad to show him whatever we had on them.

Q. Well, are those records—did they refer to your payroll?

A. I believe that he, from visit to visit, would want to know approximately what total payment or payroll had been expended on the job in order to determine our standing.

Q. I see. And you always gave him reports of what records you had of your production, isn't that true?

A. I think so.

Q. Did you have any distinct recollection of the matter?

A. Not that I remember, no.

Q. Did you ever add to or bring in any additional equipment after the pioneer plant, in reference to your operation, before dismantling your plant and leaving the job?

A. You mean after Basich Brothers brought the pioneer in did we bring in additional equipment?

Q. Yes.

A. No, not to my knowledge, unless it was some local rented units.

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. Did you ever—in your opinion the local rented equipment was necessary in your operations?

A. Yes, it was.

Q. And the rental was, in your opinion, reasonable rental?

Mr. McCall: I object as calling for a conclusion because the rental has not been provided this witness, as charged by Basich.

Witness Frazzini: In some instances we did not even ask for a rental rate because we were familiar with all O.P.A. regulations and knew they could be confined with that rate at all times.

Mr. Monteleone: You knew that all the rents were confined within that limit, don't you?

A. I don't know because I have never been billed with a full list of rentals from Basich.

Q. But as far as your investigation is concerned, you know of nothing to the contrary, is that right?

A. That is right.

Q. Did you ever make any request from Basich Brothers for a statement?

A. I never remember of having made one.

Q. They never refused you one, either, did they?

A. They did not to my knowledge.

Q. Now, did you ever discuss, during your operation, the matter of renting a plant owned by P.D.O.C.? And when was that matter first discussed.

A. The exact date or even the approximate date I don't remember but the subject was brought up to us by Mr. Kovick.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. Did you ever discuss the matter with Mr. Bray while he was in there?

A. Yes, I did.

Q. And when was it discussed with Mr. Bray?

A. During one of his visits in fact I believe it was the one in which Mr. Baloo was present.

Q. That's the engineer? A. Yes.

Q. And did Mr. Baloo and Mr. Bray go over to see that plant?

A. I don't know if they did or not.

Q. Did you tell them where the plant was?

A. I don't remember of their asking about it at all, although I very easily could have.

Q. What was the nature of the discussion between you and Mr. Bray and Mr. Baloo with reference to this P.O.D.C. plant?

A. I wouldn't remember exactly but I believe we discussed the amount of rental on the plant and its availability and what it could produce in relation to our operation, and——

Q. And did you tell Mr. Bray and Mr. Baloo then that the plant was available?

A. I believe I did.

Q. And did you tell them that it could be used in connection with your operation?

A. I am sure that if I told them that it was available that that covered it, yes.

Q. Did you ever discuss the matter with any representative of the P.D.O.C.?

A. No, I did not.

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. Do you know a Mr. Earle? A. Yes.

Q. And who is he?

A. I believe he is the vice-president of P.D.O.C. but if not he is the highest official in Arizona.

Q. Did you ever discuss the plant with Mr. Earle? A. I did not.

Q. Were you ever present when that matter was presented to Mr. Earle? A. I was not.

Q. And did you ever discuss the matter with Mr. Bray at any subsequent time? In the procuring of that plant?

A. That I cannot say, although I would think that I probably did.

Q. And did you ever discuss it with Mr. Basich?

A. I did.

Q. And on how many occasions?

A. Oh, I would think possibly three occasions.

Q. And were you present at any time when Mr. Basich and Mr. Bray and yourself were present in the matter of procuring the P.D.O.C. plant, when that matter was discussed? A. Yes.

Q. And how many different occasions?

A. Only one to my knowledge.

Q. And when was that?

A. That was on one of Mr. Bray's visits in which we sat around and discussed the plant.

Q. You and Mr. Bray?

A. No, between myself and Mr. Duque and Mr. Basich. I think Mr. Kovick was also present.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. And did Mr. Bray make any comment in connection with the matter?

A. Not that I recall.

Q. Did you at any time make any comment?

A. No, not in regard to a decision. He discussed the rental rates with us and asked us if they seemed fair and so forth and so on.

Q. What did you say?

A. Insofar as the rental rates were concerned we thought that it was quite high.

Q. Well, what did he say further?

A. Mr. Bray or myself?

Q. You or Mr. Bray.

A. Well, I don't remember of going into that with Mr. Bray.

Q. While Mr. Bray was there and Mr. Basich, did you state that Duque and Frazzini would make arrangements to rent a plant? A. I did not.

Q. At any time? A. I never did.

Q. You remember that the plant was moved in near your job, do you not? A. I do.

Q. How far was that plant moved in from your particular operation?

A. Oh, my guess would be about 750 feet, something like that.

Q. Do you know when that plant was moved in?

A. Yes, roughly—it was moved in about the first of June and they were partially erected until it started operating.

Q. Do you know when it started its operations?

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

A. It was either the 7th or 8th of June, I think.

Q. That was about the time that you were dismantling your plant, is that not true?

A. That's not correct. We did not start dismantling until after that operation had commenced.

Q. I see. Now, how much were you producing from—we'll say the middle of May until this P.D.O.C. plant started its operation about the 7, or 8th of June, 1945?

A. During that particular period we had had a breakdown and our production was quite low.

Q. Well, when you say quite low, what do you mean?

A. I mean that it was, well, below an average of 800 cubic yards a day, I believe.

Q. Do you recall receiving a copy of a letter—by the way, during this period of time while your production was very low, did you have any discussion with Mr. Woolums, the resident engineer?

A. No.

Q. Or any of the inspectors, the Government inspectors?

A. I often discussed various things with the inspectors.

Q. Do you recall receiving from Basich Brothers a copy of a letter which they had received from the Government engineer in charge, do you recall that? A. I do.

Q. Now, in that letter do you recall this statement, and the letter has been introduced in evidence—

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Mr. McCall: As what Exhibit?

Mr. Monteleone: I don't recall, but it's one of the Exhibits. It's a copy of the letter from B. C. Woolums, Resident Engineer, to Basich Brothers Construction Company, dated June 7, 1945, and it's a copy of a letter which was enclosed in a letter from Basich Brothers Construction Company to Duque and Frazzini and the Glens Falls Indemnity Company, dated June 8, 1945, which said letter is an Exhibit in our case.

Mr. McCall: Well, was this letter sent to the Witness?

Mr. Monteleone: Yes, a copy was sent to this Witness. It was enclosed in copy, to Duque and Frazzini and the Glens Falls Indemnity Company, dated June 8, 1945, in which it was stated as follows: "That the Government is vitally interested in this reduction as evidenced by a letter which we received from the War Department, dated June 7, 1945, a copy of which is herewith enclosed," do you recall a copy of that letter from the Government being enclosed by Mr. Basich?

A. I think I do.

Q. Now, in that letter, Mr. Woolums to Basich Brothers, dated June 7, 1945, which states as follows: "This office has observed closely the production of gravel base course, mineral aggregate, and concrete material since these operations were begun. At the present time the heart of the material pit has been worked out and it now takes more effort and

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

more time to produce good material of which there is still an abundance at this particular location. As stated by this office in letter of February 19, 1945, this office is of the opinion a shovel should have been used in this pit. Due to the mixing of the materials which would be accomplished by the use of a shovel, a far better grade of material would be obtained in your base course. Your subcontractors, however, elected to use carry-alls. This has resulted in production of gravel base course which has alternated from fine to coarse, causing a certain amount of delay in mixing and handling of the material on the grade. The following figures are cited to direct attention to the uneven production of base course material: May 27th—475 cubic yards; May 28th—605 cubic yards; May 29—980 cubic yards; May 30th—610 cubic yards; May 31st—750 cubic yards; June 1st—0 cubic yards; June 2nd—no record; June 3rd—0 cubic yards; June 4th—0 cubic yards; and June 5th—400 cubic yards. At the present time there is practically no material on hand to lay the remaining plant mix on the job. In regard to your concrete work the following figures are cited: May 31st—mixer shut down 30 minutes due to badly graded material. This necessitated changing of the mix from a 3-inch maximum to a 1½-inch maximum to finish the concrete pour on this day; June 1st—badly graded aggregate again encountered; June 2nd—shut down at 11:00 A.M. due to no aggregate in stock pile; June 4th—changed back to 3-inch

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

maximum mix; June 6th—stopped pour at 2:30 P.M. due to no aggregate in stock pile. Your sand screening plant ran steadily from May 1 to May 15 and then shut down until June 1st; on June 1st it was started again and ran until 12:00 noon on June 2nd when it again broke down; started again June 6th at noon, and at the present time is being fed very slowly. Your stock pile consists of approximately 200 yards of sand.” Now are those facts true as stated by Mr. Woolhums in this letter?

A. I can't say without checking.

Q. Now, it was after the shut down of your plant, after the lack of sufficient material being produced by you that Basich brought or installed this P.D.O.C. plant, isn't that true?

A. That I couldn't say.

Q. Now, that operation of Basich Brothers P.D.O.C. plant did not in any manner interfere with your own operation? A. It did not.

Q. Yes?

A. Only that it was taking away material that we were supposed to produce under our contract.

Q. Then you weren't producing the required material under your contract, were you?

A. No, we were not.

Q. Did you make any arrangement up to the time that Basich Brothers moved in this P.D.O.C. plant to add additional equipment to produce this material?

A. Not in the latter part of the job.

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. Did you make any arrangements for any other plant to do so? A. We did not.

Q. And that was the reason you closed down your job, isn't it? A. Yes, that is true.

Mr. Monteleone: That is all.

Mr. McCall: It is now 4:25. Why don't we have a short recess while I consult with my associate attorney. We might have some questions.

Mr. Goldwater: You have no objection to that, Mr. Monteleone?

Mr. Monteleone: You will have to consult this little lady (indicating reporter).

(At this point a recess was taken.)

After Recess

Mr. Monteleone: I, pardon men, I have just one or two more questions. Q. Now, as I understand from your testimony, your payrolls while you were operating were prepared under your supervision. You kept records of it and then they were given to Basich Brothers Office to be actually paid, is that correct?

Witness Frazzini: A. I believe so. I didn't actually do that personally.

Q. But it was under your supervision?

A. I would say it was.

Q. In the ordinary course of your business?

A. Yes.

Q. And they were all correct entries made in your payroll, is that correct?

A. I presume so.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Mr. McCall: Just a second, what was that question?

(Question and Answer read by reporter.)

Mr. Monteleone: Q. Now, you know of no error having been made?

Mr. McCall: What are you talking about?

Mr. Monteleone: The payroll of all the men in connection with his operation.

Mr. Goldwater: You mean the sheet submitted by Duque and Frazzini?

Mr. Monteleone (nodding head): To Basich Brothers and that would include your payroll for the operation of your pioneer crusher plant. Isn't that true?

Witness Frazzini: Well, it has been brought up several times today and reiterated, and I am under the impression that those time cards and that payroll were directly turned into Basich Brothers by Mr. Paul Albino, although I'm not certain.

Q. And you made arrangements with Basich Brothers to rent that pioneer plant without any operators at 10c a cubic yard.

A. The rate is correct, but there was a condition of rental that we must take his operators.

Q. But you were on the—you were to pay for the operators, isn't that true?

A. That is correct.

Q. You can't state whether or not the payroll in connection with the operation of the pioneer

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

crusher was under your supervision—prepared by you or not? A. I can't.

Q. The men that were used in operating the crusher were necessary to economically operate that pioneer crusher, isn't that true?

A. They were.

Q. Now, in your contract with Basich Brothers, have they required you to pay workmen's compensation and if not, Basich would pay it, is that correct? Did you yourself pay it?

A. We did not.

Q. That was paid by Basich Brothers?

A. I presume it was.

Q. And charged against you?

A. I don't know.

Q. Now, during your operations, you rented, in addition to the pioneer plant certain other equipment from Basich Brothers, didn't you?

A. What are you thinking of specifically?

A. Well, did you rent any bull dozers?

A. Yes, occasionally we rented one.

Q. Did you ever rent a tractor from him?

A. I believe so.

Q. Did you ever rent any trucks, semi-trucks from him?

A. I believe we rented trucks that were under lease to him at certain periods, yes.

Q. Did you ever rent any welding trucks from him? A. Not to my knowledge.

Q. Did you ever rent a Northwestern shovel from him?

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

A. I don't believe so. I'm almost positive that we did not.

Q. You didn't rent a shovel during the month of March from him?

A. I'm positive that we did not unless it would be for just a few hours, two hours or so.

Q. That's what I mean.

A. Two hours or four hours, something like that, yes.

Q. Did you rent a truck crane from him during the month of May? A. I believe we did, yes.

Q. And were they fully operated?

A. Virtually anything we rented from Basich Brothers was fully operated.

Q. And you discussed the terms with Mr. Basich at the time you rented them?

A. No, I don't believe I did, but I assumed that they would be within the O.P.A. price.

Q. And was this equipment necessary in connection with the economic operation was it not?

A. Yes.

Q. Do you recall renting a Simon screen from Mr. Basich during the month of March?

A. That screen—let's see. That screen was brought in by Basich Brothers from Los Angeles although right now I don't recall any agreement to pay rental on it. I assumed it was part of the pioneer plant that he was to furnish.

Q. Did you discuss the matter with him at the time? A. I believe we did.

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. How about a conveyor—did you rent one from him?

A. I'm hazy on that for the reason Mr. Basich brought a number of extra conveyors along with the pioneer plant into Tucson which I assumed were to be part of the plant and if rental was charged on those, I'm not acquainted with it.

Q. How about a generator. Did you rent a generator from him?

A. Yes, he brought in two generators from Los Angeles and now there is another thing I don't know if we were supposed to pay a separate rental on those or not.

Q. They were necessary in connection with your operation?

A. They were, yes.

Q. How about a bunker from him?

A. Well, there again I could not say. The only bunker I remember of renting were directly from P.D.O.C. although Basich sent extra bunkers in with the pioneer crushing plant.

Q. They were used by you?

A. Yes, they were used in connection with our operation.

Q. And they were necessary?

A. They were, yes.

Q. Now, did you rent certain equipment through Basich Brothers that were owned by J. J. North and son?

A. Yes, some trucks.

Q. Dump trucks?

A. That is correct.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. And they were used in your operation, were they not? A. They were.

Q. You never paid J. J. North for that did you?

A. I'm under the impression that we paid Mr. North for some trucking at the very end of the job, but I can't remember specifically what amount it was for, for it seems to me like most of the rentals, if we had any from North, would have been charged to Basich.

Q. Did you ask Basich to get you certain trucks from North? A. Yes, we did.

Q. You told Basich that you needed those trucks in connection with your operation didn't you?

A. We didn't discuss that, but we asked him for trucks from North, yes.

Q. And you told Basich that you would pay for the renting of them, didn't you?

A. No, we didn't tell him we'd pay him, but we assumed that we would.

Q. In other words, it was in connection with your own operation that these trucks were used?

A. That is right.

Q. And as far as the rental is concerned, they were within the O.P.A. regulations, were they not?

A. Well, we have never been billed for them.

Q. But as far as you know—did you discuss what the terms of those rentals were?

A. No, we had heard indirectly that those trucks were being rented at the full O.P.A. scale and we assumed that any payment would be that way.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

asked that question and any statement that they assumed, that Basich Brothers assumed any obligations outside of what they were required to assume under their contract with Duque and Frazzini, would be a conclusion on the part of this Witness. For that reason, I object to the question.

Witness Frazzini: That particular agreement was made with Mr. Nick Basich in Los Angeles at the time the contract negotiations were on, and the understanding was, that as soon as those men arrived on the job to erect the plants he would pay their wages.

Q. What men do you have reference to when you say "as they would arrive on the job."

A. Those were my men, the men that we brought in from California or Nevada to work on that project.

Q. And when did they arrive on the job?

A. I believe about the same time we did. We probably started work about the 11th of February.

Q. And was Mr. George Kovick superintendent for the pioneer on the job at that time?

A. He was not.

Q. When did he come on the job?

A. He came several days later, I think, from Los Angeles where I had seen him during the contract negotiations.

Q. Then after you went on the job, on or about February 11, 1945, did you carry any of the men

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

on your own payroll, or furnish materials or supplies in connection with the sub-contract work?

A. We did not.

Q. Did you carry any insurance compensation, public liability, or other insurances on the men who were working in the pit on the sub-contract work?

A. We did not.

Q. Well, who did carry the insurance?

Mr. Monteleone: If he knows.

Witness Frazzini: I do not know.

Mr. Monteleone: Now, wait a minute. I object to the question, if the witness does not know——

Witness Frazzini: I do not know, but I assume——

Mr. Monteleone: I object to what the Witness assumes. I know, Mr. Frazzini, you are anxious to get as much as you can into the record, and that you are anxious to build up the defense in this case——

Mr. Frazzini: Please contain yourself, Mr. Monteleone.

Mr. Monteleone: You know very well that what you may assume is not competent in testimony. You have had enough experience in litigation to know that.

Witness Frazzini: I have not, and I did not know that, frankly.

Mr. Monteleone: Well, then you didn't let me complete my objection——

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Mr. Goldwater: Well, can't the Witness answer the question, subject to your objection and let the Court decide the objection?

Mr. Monteleone: The Witness can go ahead and answer.

Mr. McCall: Q. Mr. Monteleone, as attorney for the Defendants in this case, which is the Glens Falls Indemnity Company, I'll ask the Witness and his counsel to give you all the time in the world you want to object to any question I have asked.

Mr. Monteleone: I want to put in an objection. The witness can go on and answer it with the understanding that I'm reserving the right to make a motion to strike out any of his answers at the proper time.

Mr. McCall: Q. Then you did not carry any of the men on the sub-contract working on your payroll from the time the work started until the end, is that right?

Witness Frazzini: That is right.

Q. And did you report to the Government in connection with any withholding tax reports?

A. We did not.

Q. Now, did you request anybody, individuals, or corporations to make these payments in your behalf?

A. We did not.

Q. Did you—did anyone voluntarily state to you that he would pay all of your labor and equipment charges and insurance?

A. Mr. Nick Basich told me at the Los Angeles

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

office when we were making up this contract that he would carry the payrolls and as far as accident insurance; I do not remember his mentioning any materials at that time.

Q. Well, we'll go back to the 11th day of February, 1945, when you went on the job and started to install equipment, Is that what you started doing, at that time? A. Yes.

Q. Was there anything said that day between you and Mr. Basich or you and Mr. Kovick with reference to who was going to pay the bills for labor?

A. No, Mr. Basich wasn't present at that time and I don't believe Mr. Kovick was present at that time, but I never had any subsequent discussions after talking with Mr. Basich in Los Angeles about it. He just automatically began paying them.

Q. Then did you start producing material on or before the 19th day of February, 1945?

A. We did not.

Q. And what date did you start to produce material, if you recall.

A. I don't remember the exact date, but I believe it was about the 25th of February.

Q. Then after you started producing material, when did you first start to stock pile the material mined? A. From the first day.

Q. And who selected the place where you would stock pile?

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

A. Well, Mr. Kovick selected that spot. I had selected one down at the large pit near our plant and he selected one up on the barge toward his plant, and said that he wanted the stock pile there, which we did not want to do because we could stock pile at the site chosen by us, we figured with one truck, whereas the site chosen by him would require two to three trucks. Eventually I acceded to his demand in order not to break with him.

Q. Then after the date that Mr. Kovick selected the place where you should stock pile, did he give any directions to you and your men after that date and prior to May 19th, mentioned here today?

A. Well, he often told us that he thought we should dig in a certain place in the pit to obtain better material or that we should erect a certain part of a plant a certain way, but that would be all.

Q. Now, under the examination by the attorney for the plaintiff you stated in effect that you wanted to shut down or gave orders to shut down on May 19th so that you could use the shovel or other equipment to explore for better material? A. Yes.

Q. And did you find the better material?

A. Yes, we did.

Q. And how far was that from where you were operating at the time you requested the shut down?

A. I would guess from the limits of one of the pits we were working in, that it would be 250 or 300 feet away, possibly.

Q. And did you bring that to the attention of Mr. Kovick?

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

A. No, I believe Mr. Kovick came over while we were doing the work, trying to locate it, and saw us doing it. But we went over there as we understood the whole ranch was under lease for that purpose.

Q. Well, did you stay over then even after you found this better material? A. No.

Q. Well, then if you did not stay over there to produce material, why didn't you?

Mr. Monteleone: I object as to what his reasons were—his conclusion. You may go ahead and answer.

Mr. McCall: Well, strike the question then, because it's not as definite as it could be. I'll ask you if anyone told you not to move over there to produce material.

Witness Frazzini: Yes.

Q. You say someone did tell you not to move over there. Who was it?

A. Mr. Kovick and Mr. Woolums.

Q. And what time was this with reference to May 19, 1945, when they countermanded your order?

Mr. Monteleone: Just a moment, there is no testimony that there was any order countermanded.

Witness Frazzini: You're well aware that there was, Mr. Monteleone.

Mr. Monteleone: I'm not arguing with you, Mr. Frazzini, I'm merely putting in an objection.

Mr. McCall: Go ahead with the answer.

Mr. Frazzini: What was that question again?

(Question read by reporter.)

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Witness Frazzini: I believe it was afterwards.

Q. And how long after May 19th?

A. It was either—I don't recall if it was that same day or the next day. It could have been that it was within several days of that time because we were prepared—as soon as we discovered that strata of gravel, to go in there and feed it into the plant, when they told us not to.

Q. When you say "they," who do you refer to?

A. To Mr. Kovick and Mr. Woolums.

Q. Then sometime after June 1. You testified here this morning that you wrote a letter to the plaintiff here stating that if he insisted on producing material that you were going to leave the job or words to that effect? What day did you leave that pit?

A. What pit are you referring to?

A. Where the gravel or aggregates were produced.

A. I believe we suspended operations, as near as I can remember, on the 8th and we were busy for a week or ten days after the 8th or after the 9th or 10th, somewhere in there, we were busy let's say a week, dismantling those plants.

Q. What plants do you refer to?

A. I am referring to the crushing and screening plant, an A.B.C. plant and a sand plant that we had erected and a portion of a scaling plant that had been incorporated into the Basich Brothers pioneer plant. We erected as much of that as they would let us.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. And what other machinery was in operation at that time producing material?

A. During the time we were dismantling these plants?

Q. Just before you started to disassemble your plants.

A. Do you refer to right after June 9, when we wrote Mr. Basich of Basich Brothers a letter?

Q. That is right, yes.

A. At that time they had brought in a plant, another pioneer plant. Incidentally, belonging to the P.D.O.C. Construction Company and had erected and began production with that in a pit about—oh, just roughly 750 feet from your crushing and screening plant and that plant that I'm referring to is the one in which we were referring to that we wrote Mr. Basich the letter saying that he was producing materials that were to be produced under our contract and that unless he suspended operations that we would do so.

Q. Did he ask you too, for your permission to put in this P.D.O.C. plant? A. He did not.

Q. And did you know he was going to put it in before he did put it in?

A. We observed him installing the plant, if that's what you mean?

Q. And was the material that he started producing with that plant the same material that was mentioned in your subcontract?

A. Yes, it was.

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. Then after you wrote him the letter, did he cease operating the P.D.O.C. plant?

A. No, he did not.

Q. Then at the pioneer plant—was the pioneer plant and the P.D.O.C. plant in operation when you wrote the letter?

A. I—yes, I believe they both were, as far as I can remember.

Q. And did both of those plants continue to operate? A. Yes, they did.

Q. And when you left the pit was there any interruption that you know of, in the production of the material?

A. Insofar as those two plants were concerned?

Q. Yes.

A. No, I don't believe that there was. They were both producing, if that's what you mean.

Q. And did Mr. Albino stay on operating at the pioneer plant? A. Yes, he did.

Q. Did any of the employees or the employees operating the pioneer plant stop work when you left the pit that you know of?

A. Not that I know of. I believe they all stayed on.

Mr. Monteleone: I move that that be stricken out, what he believes, if he doesn't know of his own knowledge.

Mr. McCall: Q. Tell me, Mr. Frazzini, what was Mr. Kovick doing in the pit from the time he

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

first came on there about February 11th, and thereafter until you left them?

Witness Frazzini: A. Well, he had a number of different things that he did. Early in the month of February from the 11th on, until the time we actually began production he didn't have much work going at the time in the Field and he was quite often at the pit and he helped us in every way possible, I guess, to get our plant running and then shortly after we arrived in Tucson the pioneer crushing plant was brought in by Basich and he was very often around there instructing Mr. Albino as to how to set it up and he was checking materials that is to see where the best materials might be obtained in the pit and I think that would pretty well take in his activities.

Q. Did the foreman of Basich Brothers Construction Company ever send you a bill covering the compensations and other insurances on the job?

A. No, not to my knowledge.

Q. Did Basich Brothers Construction Company, the plaintiff here, ever give you a bill covering the labor that they charged to you on the job?

A. I think not.

Q. I'll hand you what purports to be a bill of particulars furnished to the Defendant the Glens Falls Indemnity Company by the Plaintiff, and ask you if the Plaintiff here ever gave you a copy of that bill of particulars?

(Hands to witness.)

A. No, they did not.

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. Then on the equipment which has been referred to here as being rented for you by Basich Brothers Construction Company. Did you have a written contract with them for the equipment that you asked them to rent?

A. Do you mean with Basich Brothers?

Q. Yes. A. No, we did not.

Q. Did you have a contract with anybody for the equipment that Basich Brothers Construction Company furnished on the job?

A. Off hand I do not recall any such agreement.

Q. Go ahead.

A. (Continuing): Although it would have been possible.

Mr. Monteleone: Mr. Frazzini, kindly don't go into a matter that might be possible, just encumbers the record. It's not material in this matter. I have no objection to your going into detail but I know you're anxious to cover as much ground as you can, but you have answered the question all right.

Witness Frazzini: As you have said several times, Mr. Monteleone.

Mr. McCall: Q. Then, I'll ask you what was the procedure when you rented equipment from Basich Brothers or equipment belonging to Basich Brothers was used on the subcontract jobs? I'm referring to the pit.

Mr. Monteleone: Will you read that question back, please?

(Question read by reporter.)

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Mr. Monteleone: Is that a general question or a specific question as to the particular items, Mr. McCall?

Mr. McCall: Just a general question as to all the equipment which Basich Brothers has charged against Duque and Frazzini, which of course he has no knowledge of at this time.

Mr. Monteleone: I'm going to object to the question as being too general. But let the witness go on ahead and answer it.

Witness Frazzini: A. There would be several different conditions that prevailed for instance on certain equipment we rented from Basich that was fully furnished, the procedure there would be that they brought their time cards over to be signed and that was rented on what is known as a fully operated basis; and then on the pioneer crushing plant, which was the biggest item we had rented, we had no written contract on it except a letter that Basich Brothers sent us stating the rental terms and that was just on a basis that would be determined by eventual yardage or tonnage and then we had equipment rented from—for instance, from P.D.O.C. construction company, some which was on a bare rental basis that was procured for us by Basich and then on fully furnished basis, that I would classify as having been procured for us by Basich because they were using the equipment too and those are pretty generally the conditions that we used them under.

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. Well, did you also give to Basich Brothers some memorandum in writing to show that you received equipment which you ordered?

A. No, we did not. The only thing in writing on that would be that on Basich Brothers units that were fully operated. They usually brought their time cards over for signature and that's also true with P.D.O.C. equipment; but anything rented on a bare rental basis without the operator on a monthly basis nothing was ever signed on that to my knowledge.

Q. But on all equipment fully rented, operated, you signed a card or statement to the effect that you received it, is that right?

A. Well, I believe we signed their daily time card on those units, that's for Basich and P.D.O.C.

Q. Now, we refer to schedule 39, the bill of particulars, which refers to item 11 in the subcontract, just a moment, it's not item 11 in the subcontract, it's article 23, item 11 in the subcontract, on page 6 which says: "measurement to be computed on truck water level." Do you remember that item?

A. I remember one item of crusher run that was to be computed on that basis but just off hand I don't recall the technical names unless you refresh my memory on it.

Q. Well, I'll show you the schedule 39 in this bill of particulars, copy of which counsel has before him, and ask you if you had any contract or agreement with Basich Brothers after the signing of your

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

subcontract to calculate that material otherwise than is stated in the subcontract?

A. No, not to my knowledge.

Q. You will note the subcontract calls for 40c a cubic yard and the material has been added up in square yards and then reduced to cubic yards. Do you know on what basis, for what reason that was done?

A. No, I don't.

Q. Then the auditor who went into the books, found, according to the record, a card of John Brown on March 17, 1945, showing 8½ hours' overtime, all the same day and the payroll sheet shows that he worked 11 hours and he was paid for 11 hours. Do you know why this discrepancy came in there?

A. No, I don't.

Q. If there is any discrepancy in the time mentioned on the cards signed by the employees and the amount that they were paid, do you know why this came about or how it could have come about?

A. No, I don't.

Q. There was something said here about Basich Brothers taking a power plant off a crusher and my notes are not clear on that. Could you tell us if the plaintiff here took a power plant off of a crusher without your consent?

A. Yes, I presume you are referring to the P.D.O.C. power plant which was rented for us by Basich Brothers and which they took away from our crushing and screening plant, known as the A.B.C. plant, without our permission during one of our breakdowns, and took that over to power the

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. After Basich Brothers Construction Company installed the P.D.O.C. plant you mentioned a few moments ago and started producing material covered by your subcontract, did you have any discussion with either Kovick the general superintendent, or with Basich?

A. You mean—I do not remember of any discussion pertaining to that plant.

Q. Then the only thing you did was to write them a letter telling them that you were pulling off if they did not stop producing?

A. Yes, that occurred, and that plant was mentioned in that letter.

Q. Now, you stated a while ago that you gave certain time cards to Mr. Bray. Could you tell us how many time cards you turned over to Mr. Bray?

A. Not in the actual number. I turned over every time card to him that we had in connection with that job.

Q. And did they represent all the employees that you had ever hired on the job?

A. Insofar as I know they did, yes.

Q. In other words, each employee had a time card for each day's work, is that right?

A. That is correct and they should have been complete, although a few may have been lost.

Q. And the foreman or someone else signed the time cards?

A. I couldn't say that they did or didn't. In fact, I know they were not always signed, but Mr. Duque

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

and myself tried to make available enough time each day to go through the time cards for the previous day and be sure that no employee had turned in more hours than he actually worked.

Q. Mr. Frazzini, what became of the information that was contained on those time cards?

A. Well, it's still on the time cards.

Q. What was it used for, if anything.

A. Well, it was made to make up a weekly payroll for the employees for Basich Brothers.

Q. And was that weekly payroll made up by one of your employees or an employee of Basich Brothers?

A. I think Mr. Duque made it up most of the time.

Q. Was it signed by anyone?

A. I don't know. I presume Mr. Duque signed them.

Q. You don't know? A. No, I don't.

Q. You didn't see him take off any information from the time cards and transfer it to the weekly payroll sheet?

A. Yes, I often did see him do that.

Q. And then you would say that any weekly payroll sheet taken from the time cards would be either signed by your Mr. Duque or one of your foremen.

A. Well, no foreman working for us ever made that payroll sheet up and it was mostly made up by Mr. Duque and I don't ever remember of signing one

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

and I don't know actually that Mr. Duque signed one, but I was presuming that he did.

Q. Mr. Goldwater is Mr. Frazzini's counsel and he may wish to ask a few questions.

Mr. Monteleone: Let the record show that Mr. Goldwater is questioning Mr. Duque.

Witness Frazzini: Mr. Frazzini.

Mr. Monteleone: Yes, Frazzini.

(At this point Mr. Goldwater questioned the Witness in behalf of Mr. McCall since he was not present in an official capacity.)

Q. (By Mr. Goldwater): Now referring to the stock piles, Mr. Frazzini. According to the contract, the stock piles were to be re-handled by the party of the first part in the contract with Basich Brothers Construction Company?

Witness Frazzini: A. They were handled by Basich Brothers, the re-handling of the stock piles in any way.

Q. Did the re-handling of that stock pile in any way change the quantity and the quality of the aggregate or other materials produced by reason of that handling? A. Yes, it did.

Mr. Monteleone: I object to the question for the reason that Mr. Duque and Mr. Frazzini have not appeared in this action and the matter is a matter of incompetency, irrelevancy, and not material.

Mr. Goldwater: I think I would rather have Mr. McCall ask the questions because I think that it is

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

proper inasmuch as he is representing the Glens Falls Indemnity Company and Mr. Frazzini would not be under the jurisdiction of the court. It's just as well that the record show Mr. McCall as asking the questions.

Mr. Monteleone: Very well, that may be understood that the questions will be asked by Mr. McCall and I will not take cognizance of the fact that you actually asked the question.

Mr. Goldwater: You were referring to the stock piles. Now these stock piles suffered both in quantity and quality by reason of Basich's re-handling of these stock piles?

Witness Frazzini: In pushing these stock piles within reach of a loading machine to put them into bunkers for blending, a large—approximately 22 ton caterpillar bulldozer made continual trips up and down these stock piles grinding this formerly clean rock into finer particles, thereby making it dirty. Also, the operator mixed up stock piles which was sometimes contemplated at our expense and in fact in connection with one of these large piles containing, by our estimate, 3,000 cubic yards, which this bull dozer was walking on and had packed clear down and pushed dirt up with it, Mr. Kovick informed us that the entire stock pile had been condemned, although that was an error on his part. So on the whole it was very harmful to our aggregates.

Q. By reason of the re-handling of the stock piles you had to re-run material did you?

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

A. That is correct.

Q. Can you mention the number of occasions on which this occurred?

A. It didn't occur very many times. One of the worst harms I believe it did was that it continually brought to the attention of the U. S. Engineers that the material was not clean by reason of this caterpillar walking on them.

Q. That would slow down your production to some extent, would it not? A. Yes, it did.

Q. When you first started producing did Basich Brothers take the material from the bins of gravel embankment material?

A. No, they did not.

Q. You started to stock pile almost immediately?

A. We did, as soon as we started production.

Q. At the time you received the letter listing the lack of materials on the job as certified to by the engineer, did you make a check to determine whether there was sufficient material for Basich Brothers?

Mr. Monteleone: Are you referring to the letter of Mr. Woolums, dated June 7, 1945?

Mr. Goldwater: Was there a previous letter?

Mr. Frazzini: No.

Mr. Monteleone: The answer is no?

Witness Frazzini: No, that's not the answer. There was not a previous letter to my knowledge.

Mr. Goldwater: There was no previous letter?

A. Not to my knowledge.

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. Was there any periodic check taken by you in regard to the amount of material produced?

A. We kept a daily truck check in order to determine approximately how much material we were producing each day.

Q. But there wasn't any weekly check up between you and Basich Brothers of all the plants or any one plant?

A. No, there was not.

Mr. Goldwater: That is all.

Mr. McCall: Wait just a second, I want to ask—I'm showing the witness what purports to be schedule No. 37, if you please, Mr. Monteleone, and I'll call your attention to the item on there of \$360.50 and ask if you know what that is for?

A. Apparently that's the return freight on a shovel that we had previously rented from the Phoenix-Tempe Stone Company on its return trip from Tucson to Phoenix by Basich Brothers.

Q. Did you agree to pay that to anyone?

A. We did not. In fact we made a specific agreement with Mr. Van Dorne, the president of the Phoenix-Tempe Stone Company and with Mr. Koiack of Basich Brothers, that they, Basich Brothers, would pay that rental before we released the shovel in lieu of which we were going to return the shovel directly to Phoenix to the Tempe Stone Company on or about the 10, 11 or 12th of June.

Q. Then, as I understand it, when you started to return the shovel to the Tempe Stone Company at Phoenix, Basich Brothers Construction Company

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

agreed to pay the freight or take it back if you turned it over to them?

A. That's the exact conditions upon which we released the shovel to Basich Brothers.

Mr. McCall: That is all.

Redirect Examination

By Mr. Monteleone:

Q. Now, had that been returned by you to the Tempe Stone, you would have had to pay the freight, wouldn't you?

Witness Frazzini: A. That is correct.

Q. Now, you specified that when the contract was signed by you and Basich Brothers Construction Company, that they would agree to pay your payroll and insurance, and accordingly you prepared weekly payrolls, that were submitted to Basich Brothers after you started your operation, is that correct? A. That is correct.

Q. And that was the reason, was it not, why you incorporated in your contract subdivision 3, of Article XIV, which provided that Duque and Frazzini to submit weekly payrolls by Monday night of each week, which is closed on Saturday at midnight, to Basich Brothers Construction Company. Basich Brothers Construction Company to pay labor compensation insurance public liability property damage and various insurances, employment, federal old age assistance on employees and other insurance on labor and charge same to Duque and Fraz-

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

Q. Was there any periodic check taken by you in regard to the amount of material produced?

A. We kept a daily truck check in order to determine approximately how much material we were producing each day.

Q. But there wasn't any weekly check up between you and Basich Brothers of all the plants or any one plant?

A. No, there was not.

Mr. Goldwater: That is all.

Mr. McCall: Wait just a second, I want to ask—I'm showing the witness what purports to be schedule No. 37, if you please, Mr. Monteleone, and I'll call your attention to the item on there of \$360.50 and ask if you know what that is for?

A. Apparently that's the return freight on a shovel that we had previously rented from the Phoenix-Tempe Stone Company on its return trip from Tucson to Phoenix by Basich Brothers.

Q. Did you agree to pay that to anyone?

A. We did not. In fact we made a specific agreement with Mr. Van Dorne, the president of the Phoenix-Tempe Stone Company and with Mr. Kock of Basich Brothers, that they, Basich Brothers, would pay that rental before we released the shovel in lieu of which we were going to return the shovel directly to Phoenix to the Tempe Stone Company on or about the 10, 11 or 12th of June.

Q. Then, as I understand it, when you started to return the shovel to the Tempe Stone Company at Phoenix, Basich Brothers Construction Company

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

agreed to pay the freight or take it back if you turned it over to them?

A. That's the exact conditions upon which we released the shovel to Basich Brothers.

Mr. McCall: That is all.

Redirect Examination

By Mr. Monteleone:

Q. Now, had that been returned by you to the Tempe Stone, you would have had to pay the freight, wouldn't you?

Witness Frazzini: A. That is correct.

Q. Now, you specified that when the contract was signed by you and Basich Brothers Construction Company, that they would agree to pay your payroll and insurance, and accordingly you prepared weekly payrolls, that were submitted to Basich Brothers after you started your operation, is that correct? A. That is correct.

Q. And that was the reason, was it not, why you incorporated in your contract subdivision 3, of Article XIV, which provided that Duque and Frazzini to submit weekly payrolls by Monday night of each week, which is closed on Saturday at midnight, to Basich Brothers Construction Company. Basich Brothers Construction Company to pay labor compensation insurance public liability property damage and various insurances, employment, federal old age assistance on employees and other insurance on labor and charge same to Duque and Fraz-

Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

zini, which amounts are to be deducted from the amount earned. That is the reason that that paragraph was put in this contract, isn't it so?

A. That is so.

Mr. McCall: Just a second, I did not get the question before that.

(Question read by reporter.)

Mr. Monteleone: With reference to May 19, 1945, when you stated that you suspended your operations in order to develop new material. How long previous to that time was it that you had located this particular property?

A. We had never particularly located the spot. We were on a prospecting tour that day with this machine, trying to locate a suitable bank of material.

Q. When did you first, with reference to May 19, 1945, discover this particular portion that you say you were going to remove the material that you stated Basichs were removing from the same pit.

A. We did not discover it previously. As a matter of fact we were exploring and stumbled on to that spot because it looked good.

Q. When did you stumble onto that, with reference to May 19, 1945?

A. It was either May 19 or the next day.

Q. And did you discuss that matter with Mr. Woolums the engineer, when you discovered that spot?

A. Mr. Woolums and Mr. Kovick came out.

Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. Now, I'm asking you the questions. Just answer any way, Mr. Frazzini. Did you discuss that spot that you located with Mr. Woolums, the United States Engineer?

A. Am I confined to "yes" and "no?"

Q. Yes, I want to know. A. Yes.

Q. And when did you discuss the matter with Mr. Woolums with reference to May 19, 1945?

A. It was either on May 19th or 20th.

Q. The 20th was on a Sunday, was it not?

A. Yes.

Q. Was Mr. Woolums there this Sunday?

A. I can't say for sure. He was there one of those two days.

Q. Did you see Mr. Woolums on the job on the 19th when you returned from Tucson after you received this telephone call from Mr. Kovick?

A. It was either on the 19th or 20th.

Q. All right. And did you point out to Mr. Woolums this particular spot where you intended to remove the material?

A. He came right to it.

Q. What was that?

A. He came right to the spot?

Q. And what discussion did you have with Mr. Woolums on the 19th of May after you returned to the job with reference to the material?

A. I'm taking it that it was the 19th of May—Mr. Duque conducted most of the conversation in my

(Plaintiff's Exhibit No. 24—(Continued))

(Deposition of Carson Frazzini.)

presence and we discussed digging there with Mr. Woolums and Mr. Kovick both.

Q. What did Mr. Woolums say?

A. Mr. Woolums or Mr. Kovick, I cannot say for sure, told us that we would not be allowed to dig there. I believe they said it was because it would disfigure the man's ranch too much.

Q. Did you talk—do you know Golab, the man who owns the ranch?

A. Yes, I did.

Q. Did you speak to him about it afterwards?

A. Not afterwards, but he was there at that time.

Q. Mr. Golab was there?

A. Yes.

Q. Did he object to it?

A. I can't remember if he did or not.

Q. Was that the only reason that was given to you why the material should not be removed from that particular location that you indicated to Mr. Woolums and Mr. Kovick on this particular day?

A. As I remember it, that was the only reason.

Q. I see. Now, after you moved off of this job, you never returned back to Arizona, did you?

A. No, I didn't.

Q. All right. Now, you stated that Kovick was doing work around a pit, as a matter of fact he was superintending the batching plant of Basich Brothers on that location, wasn't he?

A. No, I think he spent very little time around there as he had a very competent man in charge there.

Q. How do you know he didn't?

(Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

A. Because it was alongside the location I was working on and I could look up any number of times a day and determine whether Mr. Kovick was present by the fact that his car was or was not there.

Q. You kept a lookout for Mr. Kovick all the time? A. Not necessarily.

Q. You knew he spent a great deal of time on the Davis-Monthaine Air Field, didn't you?

A. Early on the job he spent a great deal more time at the pit because very little work was in progress at the Field.

Q. And he was checking the trucks of Basich Brothers which drove into the place where you were operating and removing materials, isn't that true?

Mr. McCall: I object to that as having been asked and answered.

Witness Frazzini: I have never seen Mr. Kovick check them.

Q. Now, when the materials were dumped into Basich Brothers trucks from your bins, was there a record given as to the quantity of material in the truck? A. There was not.

Q. Were you ever informed of that?

A. No, we were not.

Q. And did Basich Brothers have a man there to keep check of the quantity of material that was being dumped into their trucks from your bin?

A. In the early part of the job I do not believe they did, but after the operation had been going for some time they posted a man up on the bank

(Plaintiff's Exhibit No. 24—(Continued))

(Deposition of Carson Frazzini.)

who checked the trucks from one position in all pits that were hauling into the Field.

Q. Now, all of your payrolls were signed by the employees, were they not?

A. Are you referring to the payroll cards?

Q. Yes.

A. Yes, no cards would be on order without a signature.

Q. And then they were checked over by you and Mr. Duque or you or Mr. Duque? Is that right?

A. Yes.

Q. Who is Jack Brown?

A. Jack Brown was a man brought by us from the Blythe job into Arizona who worked for us on previous jobs as a mechanic and who worked for us after we arrived in the Arizona area as a mechanic and a gravel plant operator, and those are the only capacities that I remember of his working him.

Q. And he prepared his payroll card also, did he not?

A. I believe so.

Q. As far as you know his entries were correctly made?

A. I think so.

Q. And that work was necessary in connection with your operation, isn't that true?

A. It was.

Q. Did you ever request of Basich Brothers that they give you a bill of particulars of accounting at any time?

A. Not to my knowledge.

(Plaintiff's Exhibit No. 24—(Continued)
(Deposition of Carson Frazzini.)

Q. Now, you stated that Basich Brothers never requested of you permission to move in the P.D.O.C. plant, is that true? A. For themselves?

Q. Yes. A. They did not.

Q. You duly received a letter from Basich Brothers, dated April 27, 1945, which has been introduced in evidence, which was sent to both you and the Glens Falls Indemnity Company, which states as follows:

(The above letter was read by Mr. Monteleone, copy of which was not available to Reporter for verification.)

Q. Do you remember receiving that letter?

A. I don't remember but it's quite possible—I believe I did receive it.

Q. Did you ever install any additional equipment after you received this letter, aside from what you then had?

A. What was the date of that letter?

Q. February 27, 1945. A. February?

Q. April. April 27, 1945.

A. Yes, we did.

Q. You made a request—you say you did install additional equipment?

A. I won't say install but let's see—no, I take that back, I don't believe we did.

Q. Did Mr. Bray, of Glens Falls Indemnity Company or anyone connected with Glens Falls Indemnity Company, ever state to you that the Glens Falls Indemnity Company were desirous of installing ad-

(Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

ditional equipment to meet the required production?

Mr. McCall: To which we object as irrelevant, incompetent, and immaterial. The Glens Falls was not a party to the contract.

Mr. Monteleone: Did Mr. Bray, at any time, ever state to you that the Glens Falls Indemnity Company would desire to install certain equipment in order to meet the required production?

Witness Frazzini: He never used the word "desire." In fact, while we discussed installing equipment with him he never gave us any decision or instructions or anything like that.

Q. Did anyone else that you know of connected with the Glens Falls Indemnity Company at any time following this letter of April 27, 1945, indicate to you any desire on the part of the Glens Falls Indemnity Company to install on their part any additional equipment in connection with your operation?

A. Well, by desire, I could only say this. They would either direct me or not direct me.

Q. And did Mr. Bray offer any plan to install additional equipment—did you ever discuss with Mr. Bray the installation of additional equipment?

A. Yes, several times.

Q. In connection with what matter?

A. I don't remember specifically but after his first trip to Tucson, I would discuss anything with him that would come to my mind, and I had possibly, as I would remember the major conversations.

(Plaintiff's Exhibit No. 24—(Continued)

(Deposition of Carson Frazzini.)

with Mr. Bray, and one of the things that I had discussed with him was whether it would be possible and that was the main interest in several conversations, whether it would be possible for us to obtain additional aid from Glens Falls to continue our project.

Mr. Monteleone: That is all.

Mr. McCall: I have nothing further.

(The Hearing on the above Deposition adjourned at 6:10 p.m.)

I, Carson Frazzini, have read the foregoing Deposition of testimony given by me in the proceedings had in the above entitled case, and the same is a full, true and correct transcription of the statements made by me in said cause.

/s/ CARSON FRAZZINI.

State of Nevada,
County of Washoe—ss.

I, Jeanne Brannin, a Notary Public in and for the City of Reno, County of Washoe, State of Nevada, duly appointed to administer oaths, et cetera, do hereby certify:

That the defendant, Carson Frazzini, a witness in his own behalf in the Deposition named, was by me duly sworn to testify the truth, the whole truth and nothing but the truth, and that I, a disinterested person herein, did take the said Deposition down in Stenotypy and that said Deposition was carefully read over by the witness, Carson Frazzini, and corrected by him in such particulars as he desired, and after being so read and corrected, said Deposition was subscribed.

In Witness Whereof, I have hereunto set my hand and affixed my official seal this 31st day of January, 1947.

[Seal] /s/ JEANNE BRANNIN,
Notary Public.

My Commission Expires September 30, 1950.

[Endorsed]: Filed U.S.C.C.A. June 18, 1947.

DEFENDANT'S EXHIBIT A

[Letterhead Basich Brothers Construction Co.]

P. O. Box 5416, Tucson, Arizona, May 3, 1945.

Duque & Frazzini

P. O. Box 5416

Tucson, Arizona

Gentlemen:

In answer to your letter of May 1, 1945, we have carried your request to the Resident Engineer and have obtained permission to make the substitution on the following basis.

Change from 3" Maximum combined aggregate gradation to the 1½" gradation will be applicable to all concrete poured in Area M involving approximately 4,270 cubic yards.

Substitution of the 1½" gradation will involve no change in our agreement with you nor will there be any adjustment or changes of the bid unit prices stated therein relative to concrete aggregate.

Yours very truly,

BASICH BROTHERS
CONSTRUCTION CO.

By /s/ G. W. KOVICK,
Supt.

GWK/bb

Accepted by

DUQUE & FRAZZINI.
By /s/ H. DUQUE.

[Endorsed]: U.S.D.C. Received in evidence, Oct. 14, 1946.

DEFENDANT'S EXHIBIT B

[Letterhead Basich Brothers Construction Co.]

Tucson, Arizona, P. O. Box 5416, May 1, 1945.

Confirmation of Verbal Agreement between Mr. N.
L. Basich and Duque & Frazzini.

Duque & Frazzini

P. O. Box 5416

Tucson, Arizona

Gentlemen:

Our agreement for Rental of Pioneer Crusher will be based on ten cents (\$0.10) per cubic yard for all materials processed thru the plant.

You are to furnish all labor, insurance, fuel, lubricants, repairs, screens, belting and build up the rolls and jaws at no cost to us.

This figure will not include rental of 2 additional bunkers, 1 feeder conveyor to Scalping Plant, 1 Discharge Conveyor on waste and three symons screens.

Rental for power unit to supply drive for symons screens will be charged to your account.

Very truly yours,

BASICH BROTHERS
CONSTRUCTION CO.

By /s/ G. W. KOVICK,
Supt.

Inst./NLB

Accepted by:

DUQUE & FRAZZINI.

By /s/ H. DUQUE.

[Endorsed]: U.S.D.C. Received in evidence, Oct.
14, 1946.



DEFENDANTS' EXHIBIT C

878

Recapitulation of Production Items Mentioned in Article XXIII of the Sub-Contract, Dated February 7, 1945, between Basieh Brothers Construction Company and Duque & Frazzini Taken From the Signed U. S. Engineers' Estimates to Basieh Brothers Construction Company on the Original Contract #W-04-353-Eng.-1302, dated January 25, 1945.

	Item No. 15 Gravel for Base Court		Item No. 11 Stabilized Subgrade Under Gravel Base Course		Item No. 9 Gravel Embankment		Items Nos. 21 & 22 18"-12"-18" Portland Cement Concrete Aggre- gate and 10" Concrete Airfield Pavement		Items Nos. 26A & 26B Binder Course Asphalt- tic Concrete Class (1) Wearing Course, Class(2)		Item No. 47 Concrete Aggregate for Structures		Item No. 28 Cover Aggregate for Seal Coat		
	Item 15, Series 329		Item 11, Series 329		Item 9, Series 329		Items 21 & 22, Ser. 329		Items 26A & 26B, Ser. 329		Item 47, Series 305		Item 28, Series 329		
	Estimate Number	Unit Cu. Yds.	Price \$1.50	Unit Sq. Yds.	Price \$.02	Unit Cu. Yd.	Price \$1.40	Unit Cu. Yd.	Price \$7.10	Unit Tons	Price Class (1) \$3.60 Class (2) \$3.70	Unit Cu. Yd.	Price \$50.00	Unit Tons	Price \$3.50
January 25 to February 28, 1945.....	1														
March 1 to March 15, 1945.....	2														
March 16 to March 31, 1945.....	3	6,307	\$9,460.50	34,700	\$1,041.00										
April 1 to April 15, 1945.....	4	11,662	17,493.00	15,840	475.20	500	\$ 700.00	2,630	\$18,673.00						
April 16 to April 30, 1945.....	5	3,595	5,392.50	9,561	286.83	500	700.00	8,150	57,865.00						
May 1 to May 15, 1945.....	6	11,140	16,710.00	33,256	997.68	2,500	2,800.00	2,600	18,460.00	2,023.6	\$ 7,284.95	20	\$1,000.00		
										2,703.4	10,002.58				
May 16 to May 31, 1945.....	7	5,703	8,554.50	20,448	613.44			8,355.21	59,321.99			95	4,750.00		
June 1 to June 15, 1945.....	8	1,000	1,500.00	53,784	1,613.52			9,729.79	69,081.51						
June 15 to June 30, 1945.....	9	2,986	4,479.00	-19,881	-596.43	1,900	2,660.00	5,115	36,316.50			8.5	425.00		
July 1 to July 15, 1945.....	10	774	1,161.00					3,353	23,806.30	3,551.4	12,785.04	74.5	3,725.00		
Slight Modification of Ser. 305—These Items not Listed.....	11									2,179.6	8,064.52				
July 16 to July 31, 1945.....	12							4,828	34,278.80	716	2,577.60	34	1,700.00		
June 15 to July 31, 1945—Extension of Taxiway 7 and Parking Apron.....	13	7,500	11,250.00	32,751	982.53			10,015.20	71,107.92	5,824	21,548.80	6	300.00		
August 1 to August 15, 1945.....	14					595	833.00	2,255	16,010.50	2,042	7,351.20	88	4,400.00		
										227	839.90				
August 16 to August 31, 1945.....	15	3,046	4,569.00	3,792	113.76	3,560	4,992.40	2,949	20,937.90			20	1,000.00		
August 1 to August 10, Extension.....	16	75	112.50					1,102.15	7,825.27						
September 1 to October 8, 1945.....	17	976	1,461.00	2,602	78.06	1,190	1,678.60	6,261	44,453.10	2,262.84	8,146.22	40	2,000.00		
										2,970.32	10,990.18				
		54,764	\$82,146.00	186,853	\$5,605.59	10,260	\$14,364.00	67,343.35	\$478,137.79	24,500.16	\$89,591.00	386.00	\$19,300.00	751 Tons	\$2,628.50
		Cu. Yds.		Sq. Yds.		Cu. Yds.		Cu. Yds.		Tons		Cu. Yds.			
Original Total Estimates per October 8, 1945, Estimate		47,189	\$70,783.50	154,102	\$4,621.06	10,260	\$14,364.00	56,226.00	\$399,204.60	24,500.16	\$89,591.00	380.00	\$19,000.00	751 Tons	\$2,628.50
		Cu. Yds.		Sq. Yds.		Cu. Yds.		Cu. Yds.		Tons		Cu. Yds.			

Original Total Estimates per October 8, 1945, Estimate	47,189	\$70,783.50	154,102	\$4,623.06	10,260	\$14,364.00	56,226.00	\$399,204.60	24,500.16	\$89,591.00	380.00	\$19,000.00	751 Tons	\$2,628.50
	Cu. Yds.		Sq. Yds.		Cu. Yds.		Cu. Yds.		Tons		Cu. Yds.			
Total Original Estimates To Be Paid to Basieh Brothers Construction Company	\$ 942,816.00													
Quantity Increases During the Period of This Job—Not Explained in Detail by Item Number.....	40,911.05													
Plus: Modification Increases During the Period of This Job—Not Explained in Detail by Item Number.....	40,862.23													
Total Amount Received by Basieh Brothers Construction Company on This Job—Per the Above U. S. Engineers' Estimates	\$1,024,589.28													

The Unit Prices and Dollar Amounts Shown Above Are the Prices and Amounts Paid to Basieh Brothers Construction Company.
These Estimates Bore the Signatures of B. C. Woolums or C. M. Brady as Resident Engineer, and R. A. Floyd, Captain, Corps of Engineers, Executive Assistant



DEFENDANTS' EXHIBIT D

Schedule of Payments Made by Basich Brothers Construction Company on Behalf of Duque & Frazzini February 11 to March 7, 1945

Bill of Particulars Schedules

Schedule I—Duque & Frazzini Payroll

	Date of Checks	Amount
Feb. 11 to Feb. 17	Feb. 20, 1945	\$ 565.14
Feb. 18	Feb. 27, 1945	244.57
Feb. 19	Feb. 27, 1945	226.98
Feb. 20	Feb. 27, 1945	203.75
Feb. 21 to Feb. 24	Feb. 27, 1945	1,051.85
Feb. 25 to March 3	March 6, 1945	1,770.87

Schedule XVII—Parts

Abbey Scherer Co.	March 7, 1945	80.49
-------------------	---------------	-------

Schedule XXX—Miscellaneous

Move and Set up Pioneer	March 6, 1945	75.29
----------------------------	---------------	-------

Total	\$4,218.94
-------------	------------

[Endorsed]: U.S.D.C. Received in evidence Oct. 14, 1946.

[Endorsed]: No. 11658. United States Circuit Court of Appeals for the Ninth Circuit. Glens Falls Indemnity Company, a Corporation, Appellant, vs. Basich Brothers Construction Company, a Corporation, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed June 17, 1947.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11658

GLENS FALLS INDEMNITY COMPANY, a
Corporation,

Appellant,

vs.

BASICH BROTHERS CONSTRUCTION COM-
PANY, a Corporation,

Appellee.

STATEMENT OF POINTS ON WHICH AP-
PELLANT INTENDS TO RELY ON AP-
PEAL

To Paul P. O'Brien, Esq., Clerk of Said Court, to
the Appellee Above Named, and to Stephen
Monteleone, Esq., and Tracy Priest, Esq., Its
Attorneys:

For its Statement of Points on Which Appellant Intends to Rely on Appeal, the appellant hereby adopts the Statement of Points on Which Appellant Intends to Rely heretofore filed with the Clerk of the District Court of the United States, Southern District of California, Central Division (original certified record on appeal pages 502 to 507, inclusive).

/s/ JOHN E. McCALL,

Attorney for Appellant.

Service of a copy of the foregoing Statement of Points on Which Appellant Intends to Rely on Appeal acknowledged this 11th day of June, 1947.

/s/ STEPHEN MONTELEONE,

Attorney for Appellee.

[Endorsed]: Filed July 17, 1947.



No. 11658

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,

Appellant,

vs.

BASICH BROTHERS CONSTRUCTION COMPANY, a corporation,

Appellee.

APPELLANT'S OPENING BRIEF.

JOHN E. McCALL,

926 Rowan Building, Los Angeles 13,

Attorney for Appellant.

ROBERT E. FORD,

JOSEPH J. BURRIS,

Of Counsel.

FILED

SEP 25 1947

PAUL P. O'BRIEN,

CLERK



TOPICAL INDEX

	PAGE
Jurisdictional statement	1
Statement of the case.....	3
Prime contract	3
Subcontract	3
Bond	5
Pleadings and proceedings herein.....	11
Pleadings	11
Pretrial	13
Trial	14
Questions involved	15
Specification of errors.....	17
Argument	25

I.

The complaint fails to state a claim upon which relief can be granted	25
---	----

II.

Appellee wholly failed to perform the express conditions contained in the bond, the performance of each of which is made a condition precedent to any right of recovery thereon by the obligee.....	27
(a) Appellee failed to comply with the condition precedent specified in paragraph first of the bond, which required prompt notice to the surety of any default on the part of the principal.....	27

- (b) Appellee failed to comply with the condition precedent specified in paragraph first of the bond, that in the event of any default on the part of the principal, and notice thereof, the surety should have the right within thirty days after receipt of such notice, to proceed or procure others to proceed with the performance of the contract.. 36
- (c) Appellee failed to comply with the condition precedent specified in paragraph second of the bond..... 37
- (d) Appellee failed to comply with the condition precedent specified in paragraph second of the bond, which required that the obligee retain the last payment payable and all reserves and deferred payments retainable by the obligee under the terms of the subcontract..... 38

III.

Appellant did not waive its right to plead or assert any failure of appellee to comply with any of the conditions precedent set forth in the bond, nor is appellant estopped from pleading or asserting the failure of appellee to comply with any of said conditions precedent..... 40

IV.

Appellee concealed from appellant the fact that Duque & Frazzini were in default at the time the bond was accepted..... 45

V.

The subcontract was altered by appellee without the knowledge or consent of appellant..... 49

VI.

Appellee made premature payments to or for the account of the subcontractor 56

VII.

Appellee made an election on or prior to June 8, 1945, to complete the subcontract work, instead of giving notice to appellant as required in the bond, and according it the right to proceed or procure others to proceed with the performance of the subcontract.....	61
---	----

VIII.

Appellee's claim was unliquidated, and could not bear interest prior to judgment.....	64
---	----

IX.

The District Court erred in admitting testimony of George J. Popovich concerning items alleged by appellee to have been paid out by it in connection with the subcontract, when the witness had no personal knowledge concerning the items, and was testifying from a summary of the said items as set forth in the bill of particulars, which summary was compiled by someone else, and the purported documents from which the bill of particulars was compiled were not in court and available to counsel for cross-examination, and were not shown to be admissible in evidence.....	69
---	----

X.

The obligations assumed by the surety are to be measured only by the terms of the bond to which it became a party, and not by the terms of some other contract to which it was not a party	75
--	----

Conclusion	75
------------------	----

TABLE OF AUTHORITIES CITED

CASES	PAGE
Albert Lea Foundry Co. et al. v. Iowa Savings Bank of Marshalltown, Iowa, 21 F. (2d) 515.....	63
Aronson v. Frankfurt Accident & Plate Glass Ins. Co., 9 Cal. App. 473, 99 Pac. 537.....	44
Bank of America v. Pacific Ready-Cut Homes, 122 Cal. App. 554, 10 P. (2d) 478.....	44
Coolidge v. Standard Accident Insurance Co., 114 Cal. App. 716, 300 Pac. 885.....	43
Damon v. Empire State Surety Co., 146 N. Y. Supp. 996.....	46
First Congregational Church of Christ in Corona v. Lowrey, 175 Cal. 124, 165 Pac. 440.....	54
Franklin Bank v. Cooper, 36 Me. 179.....	47
General Motor Acceptance Corporation v. Gandy, 200 Cal. 284, 253 Pac. 137.....	45
Goorberg v. Western Assur. Co., 150 Cal. 510, 89 Pac. 130.....	44
Hacker Pipe & Supply Company v. Chapman Valve Manufacturing Company, 17 Cal. App. (2d) 265, 61 P. (2d) 944.....	45
Indemnity Ins. Co. of North America v. Watson, et al., 128 Cal. App. 10, 16 P. (2d) 760.....	67
Lusitanian-American Development Company v. Seaboard Dairy Credit Corp., 1 Cal. (2d) 121, 34 P. (2d) 139.....	43
McDanel v. General Insurance Co., 1 Cal. App. (2d) 454, 36 P. (2d) 829.....	42
McManus v. Temple Estate Co., 10 Cal. App. (2d) 419, 51 P. (2d) 1124	55
Miller Rose Co., In re, 36 F. (2d) 203.....	63
National Surety Co. v. Long, 125 Fed. 887.....	31
Pacific Automotive Device Co. v. United States Fidelity and Guarantee Co., 15 F. (2d) 164.....	75

	PAGE
Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co., 214 Cal. 384, 5 P. (2d) 888.....	26, 57
People v. Doble, 203 Cal. 510, 265 Pac. 184.....	74
Perry v. Magneson, 207 Cal. 617, 279 Pac. 650.....	66
Rice v. Fidelity & Deposit Co., 103 Fed. 427.....	44
Schwab v. Bridge, 27 Cal. App. 204, 149 Pac. 603.....	39
Sherman v. Smith, 169 N. W. 216.....	47
Silva v. Linneman, 73 Cal. App. (2d) 971, 167 P. (2d) 794.....	45
Southern Surety Co. v. Chris Irving Plumbing & Heating Co., 184 Pac. 356.....	36, 44
Stern v. Sunset Road Oil Co., 47 Cal. App. 334, 190 Pac. 651....	45
Stewart & Nuss, Inc. v. Ind. Acc. Comm., 55 Cal. App. (2d) 501, 130 P. (2d) 985.....	51
Union Indemnity Company v. Lang, et al., 71 F. (2d) 901.....	33
United States v. Freel, 186 U. S. 309.....	53
Verdugo Canon Water Co. v. Verdugo, 152 Cal. 655, 93 Pac. 1021	45

STATUTES

Act of Congress, March 3, 1911, Chap. 231, Sec. 24.....	1
Act of Congress, February 13, 1925, Chap. 229, Sec. 1.....	2
Civil Code, Sec. 2819	26, 53
Civil Code, Sec. 2837.....	30
Judicial Code, Sec. 24(1)(b) (28 U. S. C. A., Sec. 41(1)(b))	1
Judicial Code, Sec. 128(a)(d) (28 U. S. C. A., Sec. 225(a)(d))	2

TEXTBOOKS

Restatement of the Law of Security, Sec. 124.....	48
---	----

No. 11658

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,

Appellant,

vs.

BASICH BROTHERS CONSTRUCTION COMPANY, a corporation,
tion,

Appellee.

APPELLANT'S OPENING BRIEF.

Jurisdictional Statement.

This is an appeal from a judgment at law of the United States District Court for the Southern District of California, Central Division, in favor of the plaintiff, Basich Brothers Construction Company, a corporation, and against the defendant Glens Falls Indemnity Company, a corporation, in the sum of \$79,582.91, plus interest in the sum of \$8,557.49 and costs of suit. [Tr. pp. 213-214.]

The District Court for the Southern District of California has jurisdiction of the action under Act of Congress, March 3, 1911, c. 231, Section 24; Section 24 (1) (b) of the Judicial Code, as amended. (28 U. S. C. A. 41 (1) (b).)

The amount in controversy, exclusive of interest and costs, exceeds the sum of \$3,000.00. [Tr. pp. 3, 89.]

The plaintiff is a California corporation. [Tr. pp. 2-3.] The defendant, Glens Falls Indemnity Company, is a New York corporation. [Tr. p. 3.]

The pleadings necessary to show the jurisdiction of the District Court are the Complaint [Tr. pp. 2-36], and the First Amended Answer. [Tr. pp. 89-145.]

The United States Circuit Court of Appeals for the Ninth Circuit has jurisdiction under Act of Congress February 13, 1925, c. 229, Section 1; Section 128 (a) (d) of the Judicial Code, as amended. (28 U. S. C. A. 225 (a) (d).)

The judgment of the District Court was entered on the 10th day of March, 1947. [Tr. p. 214.] On the 13th day of March, 1947, a stipulation between the parties hereto was filed with the Clerk of the District Court, after first being approved by a judge thereof, which allowed appellant until the 20th day of May, 1947, to post a Supersedeas Bond. On the 16th day of May, 1947, appellant filed its Notice of Appeal [Tr. p. 215] and posted a Supersedeas Bond approved by a judge of the District Court. The original transcript of record on appeal was certified by the Clerk of the District Court on the 13th day of June, 1947 [Tr. pp. 222-223], and was filed in the Office of the Clerk of this Court on the 17th day of June, 1947.

Statement of the Case.

This action was brought by appellee to recover from appellant, as surety, damages claimed to have been sustained by appellee as the result of an alleged breach of the obligations of a subcontract bond in which appellee was named as obligee, appellant as surety, and the subcontractor, Duque & Frazzini, as principal.

Prime Contract: On January 25, 1945, the United States of America, through its Engineering Department at Los Angeles, entered into a contract with Basich Brothers Construction Company (appellee) as prime contractor, whereby the contractor agreed to furnish materials, labor and equipment and construct certain air-field facilities at Davis-Monthan Field, Tucson, Arizona. [Tr. p. 542.] The prime contract provided by its terms that work be commenced on or before January 26, 1945 [Tr. p. 543] and be completed within one hundred thirty (130) days. [Tr. pp. 555, 548.]

Subcontract: On February 7, 1945, appellee, as prime contractor, and Duque & Frazzini, as subcontractor, entered into an agreement whereby said subcontractor agreed to furnish certain labor, materials, and equipment for the production of rock, gravel and sand to be used in the performance of the prime contract.

The subcontract provided, in substance:

1. That work should be commenced not later than February 19, 1945, and should be completed on or before June 3, 1945. [Tr. p. 19.] (Appellee interpreted the subcontract to require the commencement of production of material not later than February 19, 1945. [Tr. p. 463].)

2. That time was of essence of the agreement, and that it contained the whole and entire understanding of the parties thereto. [Tr. p. 31.]

3. That Duque & Frazzini erect two plants, each to produce 800 cubic yards of suitable material to be used in connection with the contract. [Tr. p. 25.] (Appellee interpreted the subcontract to require the construction of two plants, each to produce 800 cubic yards of material per day. [Tr. pp. 7, 463, 465, 472-473].)

4. That partial payments for work performed would be made by appellee on the basis of 90% of the estimates of the United States Engineers and 90% of useable materials in stockpile. [Tr. p. 23.]

5. That upon completion of the subcontract the remaining amount would be paid within thirty days. [Tr. p. 23.]

6. That the subcontractor would at his own expense provide workmen's compensation insurance in accordance with federal, state and municipal laws, and insurance against liability for injury to persons or property; that the subcontractor would promptly make payment to all persons supplying him with labor, materials and supplies for the prosecution of the subcontract work; that if the subcontractor failed to provide such insurance or make such payments when due, such insurance might be provided and such payments made by the prime contractor and the amount thereof deducted from any money due the subcontractor. [Tr. p. 20.]

The subcontract is attached to the Complaint as Exhibit "A," and appears at pages 17-31 of the Transcript of Record.

On or about February 11, 1945, Duque & Frazzini commenced the erection of a small crushing plant at the site of the subcontract. [Tr. pp. 620, 770.] Appellee's general superintendent George W. Kovick was at the subcontract site known as the "pit," on that day and every day thereafter through February supervising work relative to the production of material. [Tr. p. 627.] No material was produced until some time after the 20th day of February, 1945. [Tr. pp. 571-572, 577, 597, 770-771.]

As of February 11, 1945, all employees of Duque & Frazzini were placed on the payroll of appellee. [Tr. p. 41.]

No payment became due to Duque & Frazzini under the terms of the subcontract until after the first estimate of production was made by the United States Engineers March 31, 1945. [Tr. pp. 23, 878.]

Appellee commenced making payments for the account of Duque & Frazzini beginning with the payroll for the period from February 11 to 17, 1945 [Tr. p. 41], and prior to March 31, 1945, had paid out thousands of dollars to or for the account of the subcontractor. [Tr. pp. 879, 41-63, 66, 71-73.]

Bond: Duque & Frazzini, as principal, and appellant, as surety, executed and delivered to appellee, as obligee, a bond dated February 20, 1945, conditioned for the faithful performance of the subcontract described therein. [Tr. pp. 32-36.]

The pertinent provisions of the bond read as follows:

"NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, that if the Principal shall faith-

fully perform the work contracted to be performed under said contract, and shall pay, or cause to be paid in full, the claims of all persons performing labor upon or furnishing materials to be used in, or furnishing appliances, teams or power contributing to such work, then this obligation shall be void; otherwise to remain in full force and effect.

* * * * *

PROVIDED, however, as to said Obligee, and upon the Express Conditions, the performance of each of which shall be a condition precedent to any right of recovery hereon by said Obligee:

FIRST: That in the event of any default on the part of the Principal, written notice thereof shall be delivered to the Surety, by registered mail at its office in the City of Los Angeles promptly, and in any event within ten (10) days after the owner, or his representative, or the architect, if any, shall learn of such default; that the Surety shall have the right, within thirty (30) days after receipt of such notice, to proceed or procure others to proceed with the performance of such contract; shall also be subrogated to all the rights of the Principal; and any and all moneys or property that may at the time of such default be due, or that thereafter may become due the Principal under said contract, shall be credited upon any claim which the Obligee may then or thereafter have against the Surety, and the surplus, if any, applied as the Surety may direct.

SECOND: That the Obligee shall faithfully perform all of the terms, covenants and conditions of such contract on the part of the Obligee to be performed; and shall retain the last payment payable by the terms of said contract, and all reserves and

deferred payments retainable by the Obligee under the terms of said contract until the complete performance by the Principal of said contract, and until the expiration of the time within which notice of claims or claims of liens by persons performing work or furnishing materials under said contract may be filed and until all such claims shall have been paid, unless the Surety shall consent, in writing, to the payment of said last payment, reserves or deferred payments.” [Tr. pp. 32-35.]

The bond is attached to the Complaint as Exhibit “B,” and appears at pages 32-36 of the Transcript of Record.

On March 7, 1945, the bond was amended to change the ten days appearing in Paragraph FIRST to twenty days. [Tr. p. 462.]

The bond was made, executed and delivered in California. The District Court therefore correctly held that this bond is governed by the law of California. [Tr. pp. 5, 91, 299, 303, 191.]

All of appellee’s evidence on the point, as well as the deposition of Carson Frazzini, shows that Duque & Frazzini did not begin the production of material on February 19, 1945 [Tr. pp. 463, 471-472, 571-572, 577, 597, 770-771], nor until on or about the 25th day of February, 1945. [Tr. pp. 571-572, 577, 597, 770-771.] Even then, they failed to produce the minimum amount required by the subcontract, or as much as fifty per cent thereof. [Tr. pp. 463, 465-466, 472-473, 598, 628-629.]

Appellee, through its President, Nick L. Basich, and its General Superintendent, George W. Kovick had actual knowledge of these facts at all times. [Tr. pp. 597, 598, 627.]

The first intimation received by appellant that the subcontractor was not complying with its subcontract, was more than forty-five days after the production of material was to have been commenced, or some time subsequent to April 5, 1945. A copy of a letter dated April 5, 1945 addressed to Duque & Frazzini by appellee was sent to appellant, but it did not purport to be a notice of default. On the contrary, the letter demanded that Duque & Frazzini move in additional equipment and continue the work. [Tr. pp. 463-464.]

Appellee retained Duque & Frazzini on the subcontract work until June 8, 1945. [Tr. pp. 482-486, 491-493, 494-495, 661-663, 592-594, 831-832, 850.] As late as June 9, 1945, appellee addressed a letter to Duque & Frazzini demanding that they return to the work on or before June 15, and warning them that if they failed to do so, such failure would be deemed an act of default. [Tr. pp. 491-493.] At the time appellee wrote the letter of June 9, it had already taken over and was proceeding with the completion of the subcontract work. [Tr. pp. 831-832, 850-852, 433, 660-663, 671-672, 673, 593-594, 491-493, 494-495.]

Appellee at all times after February 11, 1945, when the work of erecting the equipment on the subcontract site commenced, carried all subcontract employees on its own payroll, and paid all wages and salaries direct to the employees performing the subcontract work with the regular payroll checks of appellee, which checks had no identification marks to distinguish them from the payroll checks of other employees on the prime contract. [Tr. pp. 637, 434-436, 846-847.]

Appellee named itself as employer of the men doing the subcontract work, in all withholding returns and withholding reports filed with the Internal Revenue Department, in all Arizona State Employment Insurance returns, in all Social Security returns and in all Workmen's Compensation and Public Liability Insurance policies. [Tr. pp. 638, 582, 322-323, 326-327, 436-438.]

Appellee rented from others, in its own name, equipment used on the subcontract work. [Tr. pp. 568, 332-346, 62, 66, 68, 69, 70, 71.]

Appellee set the rate of wages for the subcontract employees. [Tr. pp. 617, 786.]

Appellee dictated the site from which the subcontract materials were to be taken. [Tr. pp. 587, 25.]

Appellee supervised the work relative to the production of subcontract materials. [Tr. p. 627.]

Appellee made certain repairs to equipment on the subcontract work, over the protests of Duque & Frazzini. [Tr. p. 807.]

Appellee countermanded certain orders of Duque & Frazzini to subcontract employees, and assumed control of subcontract work over the protests of the subcontractor. [Tr. pp. 656-659, 605-607.]

Appellee, without obtaining the consent of the subcontractor, entered into a contract on or about June 1, 1945, with PDOC, in the sum of \$2,500.00, to have a

crusher moved into the pit for the production of sub-contract materials. [Tr. pp. 626, 433, 400.]

There is no evidence that appellant surety had any knowledge of these facts.

The subcontract provided for payment on the basis of cubic yards, measurements to be computed on truck water level. [Tr. p. 29.] Duque & Frazzini's production was measured by square yards and reduced to cubic yards. [Tr. p. 80.] Credits or payments were not based on truck water level measurement.

The subcontract set a 3" maximum for rock furnished for Items 21 and 22 thereof. [Tr. p. 26.] On May 3rd, 1945, the maximum gradation was changed from 3" to 1½" by letter contract. [Tr. p. 876.]

There is no evidence that appellant surety had any knowledge of or consented to any alterations of the subcontract.

The amounts actually paid out for Duque & Frazzini by appellee were at all times greater than the amounts due Duque & Frazzini under ARTICLE XVI of the subcontract. [Tr. pp. 23, 11-12.] Appellee's complaint alleged that on or about June 8, 1945, it had paid out \$36,456.41 more than the gross amount earned by the subcontractor. [Tr. p. 12.]

There is no evidence that appellant surety gave its consent, in writing or otherwise, to advances or premature payments by appellee to or for Duque & Frazzini.

Pleadings and Proceedings Herein.

Pleadings: The complaint of appellee, Basich Brothers Construction Company, based on one count [Tr. pp. 2-36], was filed the 27th day of December, 1945. It alleged a contract between appellee and the United States for certain construction work at Davis-Monthan Airfield at or near Tucson, Arizona. It further alleged a subcontract between appellee and Duque & Frazzini, a copy of which was attached to the complaint as Exhibit "A" [Tr. pp. 17-31], and a subcontract bond naming appellee as obligee, Duque & Frazzini as principal and appellant as surety, a copy of which bond was attached to the complaint as Exhibit "B." [Tr. pp. 32-36.]

The complaint alleged that Duque & Frazzini commenced the subcontract work on or about the 19th of February, 1945 and abandoned same on or about the 8th day of June, 1945 [Tr. p. 11]; ~~that during said on or about the 8th day of June, 1945~~ [Tr. p. 11]; that during said period appellee paid out for labor, supplies, materials and equipment \$36,456.41 in excess of the gross earnings under the subcontract [Tr. p. 12]; that after June 8, 1945 appellee completed the subcontract at a cost of \$42,047.30 in excess of the gross earning based on the subcontract [Tr. pp. 14-15]; and that appellee had performed each and every act required of it under said subcontract and bond. [Tr. p. 15.] The prayer was for judgment for \$78,503.71 with interest at 7% "from the date of said respective advancements" until paid. [Tr. p. 16.]

The first amended answer to the complaint [Tr. pp. 89-120] was filed on the 9th day of September, 1946. It denied that appellee had complied with the conditions

precedent in the bond, denied that appellee had complied with all the terms of the subcontract, denied that there was anything due appellee from appellant under the terms of the subcontract bond, and alleged as affirmative defenses that the complaint failed to state a claim against appellant [Tr. p. 99]; that appellee had failed to comply with any of the conditions precedent contained in the bond [Tr. pp. 99-109]; that appellee concealed from appellant surety the fact that the subcontractor was already in default at the time of the execution, delivery and acceptance of the bond [Tr. pp. 109-110]; that the subcontract was materially altered by appellee without the knowledge or consent of appellant [Tr. pp. 110-112]; that appellee made premature payments to or for the account of the subcontractor [Tr. pp. 112-113]; and that appellee, by taking complete possession of the subcontract work and proceeding to complete the same, elected to and did wholly waive its right to recover on the subcontract bond. [Tr. pp. 113-114.]

An amendment to the complaint [Tr. pp. 128-132] was filed on the 5th day of January, 1947. It alleged that after the execution of the subcontract Duque & Frazzini advised appellee that they were unable to meet the payroll to install and operate their plant and requested appellee to make such payments, and appellee did make said payments [Tr. pp. 128-129]; that appellee notified appellant on May 24th, 1945 that Duque & Frazzini were not paying the labor claims, that appellee had been paying for Duque & Frazzini claims for labor, material and supplies but that the amount under the subcontract was not sufficient to meet past advancements made by appellee. [Tr. p. 130.]

The amendment to the complaint further alleged that appellant did not notify appellee that it had no right to make payments in excess of the amount earned by Duque & Frazzini [Tr. p. 130]; that appellant did not notify appellee that it desired "to provide the means of fulfilling the requirements" of the subcontract [Tr. p. 131]; that by reason thereof appellant waived any right which it may have had for any failure of appellee to comply with the provisions of the bond or for any changes in the subcontract, and that appellant is estopped from asserting any rights it may have had for any failure of appellee to comply with any provisions of the bond or any changes in the terms of the subcontract. [Tr. pp. 131-132.]

An answer to the complaint as amended [Tr. pp. 133-145] was filed the 21st day of January, 1947. It denied that the payments made by appellee for labor and materials were made by it in compliance with provisions of the subcontract [Tr. p. 133], denied that appellant waived any rights which it had under the subcontract bond [Tr. p. 136], and denied that it is estopped from asserting any rights which it had by reason of the failure of appellee to comply with any of the provisions of the subcontract bond or because of any alterations of the subcontract. [Tr. p. 136.]

Appellee's bill of particulars [Tr. pp. 37-83] was filed July 1, 1946. [Tr. p. 83.] Amendments to the bill of particulars [Tr. pp. 120-123] were filed by appellee November 15, 1946. [Tr. p. 123.]

Pretrial: Pretrial hearings were held before the Hon. Peirson M. Hall on July 8, 1946 [Tr. pp. 224-243], and on October 14, 1946 [Tr. pp. 243-254] at which

time the case was submitted on the depositions of Nick L. Basich and George W. Kovick, taken by appellant, the deposition of John H. Bray, taken by appellee, and the exhibits. [Tr. p. 251.]

At a further hearing before Hon. Leon R. Yankwich on November 7, 1946 [Tr. pp. 255-279] the case was again submitted on the same depositions and the same exhibits. [Tr. p. 278.]

At a further hearing before Hon. Leon R. Yankwich on November 25, 1946 [Tr. pp. 280-312], the submission was set aside and the case set for trial on February 4, 1947 “merely for additional testimony along the lines indicated.” [Tr. p. 311.]

On January 20, 1947 appellee took the deposition of Carson Frazzini, one of the subcontractors [Tr. pp. 754-875], which deposition was introduced in evidence February 4, 1947. [Tr. pp. 312-313.]

Trial: After certain testimony was taken on February 4th and 5th, 1947 the case was submitted to Hon. Leon R. Yankwich on the depositions of Nick L. Basich, George W. Kovick, John H. Bray and Carson Frazzini, the exhibits, and the testimony in open court of George J. Popovich, Bart C. Woolums, Nickola L. Basich, and Lawrence H. Vernon. [Tr. p. 460.]

Findings of fact and conclusions of law were made and filed [Tr. pp. 193-211], and on the 10th day of March, 1947 judgment was entered for appellee in excess of the amount alleged in the complaint. [Tr. pp. 212-214.]

In the judgment appellee recovered \$79,582.91, together with interest in the sum of \$8,577.49, plus costs in the sum of \$216.80. [Tr. pp. 213-214.]

Questions Involved.

The questions involved in this appeal are:

1. Does the complaint state a claim upon which relief can be granted?

2. Did appellee comply with all the conditions precedent contained in the bond?

(a) Did appellee give notice to appellant of defaults of Duque & Frazzini promptly, and in any event within twenty days after it learned of such defaults?

(b) Did appellee accord to appellant the right within thirty days after receipt of such notice to proceed or procure others to proceed with the performance of the subcontract?

(c) Did appellee faithfully perform all the terms of the subcontract on its part to be performed?

(d) Did appellee retain the last payment payable and all reserves and deferred payments which it was obligated to retain under the terms of the subcontract and the bond?

3. Did appellant waive compliance by appellee with conditions precedent contained in the bond?

4. Is appellant estopped from asserting the failure of appellee to comply with the conditions precedent contained in the bond?

5. Did appellee conceal from appellant surety the fact that Duque & Frazzini were already in default at the time the bond was accepted?

6. Was the subcontract altered without the knowledge and consent of appellant?

(a) Did appellee have control of, and did it control, the manner in which the subcontract work was performed?

(b) Did appellee pay to or for the account of Duque & Frazzini sums in excess of those provided by the subcontract?

(c) Was Article XXIII, Item 11, of the subcontract altered to change the basis of payment to Duque & Frazzini?

(d) Was Article XXI, Section 7, of the subcontract altered to change the maximum size of rock to be produced?

7. Did appellee make premature payments to or for the account of Duque & Frazzini?

8. Did the fact that appellee proceeded with the subcontract work immediately upon the departure of Duque & Frazzini constitute an election to perform, and a waiver of any rights against appellant?

9. Is appellee entitled to interest on its unliquidated claim prior to judgment?

10. Did the trial court err in permitting witness George J. Popovich, over the timely objection of defendant's counsel, to testify from a summary of purported documents of which he had no personal knowledge, which documents were not in court and available to counsel for cross-examination and which were not shown to be admissible in evidence?

11. Are the obligations of appellant surety to be measured by the terms of the subcontract to which it was not a party, or are appellant surety's obligations solely those it undertook by virtue of its bond?

Specification of Errors.

Appellant specifies the following errors upon which it will rely in the prosecution of this appeal from the judgment of the District Court in this cause made and entered on the 10th day of March, 1947. Appellant specifies that the District Court erred in each of the following particulars:

1. The District Court erred in finding that the complaint states a claim upon which relief can be granted. [Findings XXIII and XXIV, Tr. p. 206.]

(a) The complaint, Paragraph XVI, alleges that during the period from on or about February 19, 1945 to on or about June 8, 1945 plaintiff paid out on subcontract work \$36,456.41 in excess of the gross amount earned under the terms of the subcontract. [Tr. pp. 11-12.]

The subcontract, Article XVI, provides that "Partial payments for work performed under this agreement will be made by the Contractor on the basis of 90% of engineers estimate and 90% of useable materials in stockpile." [Tr. p. 23.]

It is shown, therefore, on the face of the complaint, that unauthorized and premature payments were made by appellee in the sum of \$36,456.41.

2. The District Court erred in finding that appellee complied with all the conditions precedent contained in the bond. [Findings VII, X, XII, XIII, XIX, XXIII, XXV, XXVI, XXVII, XXVIII, Tr. pp. 197, 198, 199-200, 206-208.]

(a) The District Court erred in finding that appellee performed the condition precedent as to notice, which is set forth in Paragraph First of the bond. [Findings VII, X, XII, XIII, XXIII, XXV, Tr. pp. 197, 198, 199-200, 206.]

The evidence shows that the subcontractor was in default on February 19, 1945 and at all times thereafter, in that the subcontractor did not commence the production of material on the 19th of February, 1945 as required by the terms of the subcontract [Tr. pp. 463, 471-472, 571-572, 577, 597, 770-771], did not furnish the equipment required by the subcontract [Tr. pp. 463, 464, 465, 472], and failed to produce the minimum amount of material required by the subcontract. [Tr. pp. 463, 465-466, 472-473, 598, 628-629.]

The evidence further shows that the first knowledge or intimation received by appellant surety that the subcontractor was in default in the performance of the subcontract was contained in a letter addressed by appellee to Duque & Frazzini and a copy mailed to appellant at Los Angeles, which letter was dated April 5, 1945, more than forty-five days after the subcontractor's default on February 19, 1945. [Tr. pp. 463-464.]

The evidence fails to show that notice was ever given to appellant as required by the bond, although appellee at all times on and after February 19, 1945 had knowledge of the defaults of the subcontractor. [Tr. pp. 597, 598, 627, 629.]

(b) The District Court erred in finding that appellee complied with the condition precedent of the bond that "the Surety shall have the right, within thirty (30) days after receipt of such notice, to proceed or procure others to proceed with the performance of such contract;" as set forth in Paragraph First of the bond. [Findings VII, XIX, XXIII, XXVI, Tr. pp. 197, 203, 206-207.]

The evidence shows that appellee had already assumed control of the subcontract work before

the subcontractor left the job on June 8, 1945, and thereafter immediately proceeded with the completion of the subcontract. [Tr. pp. 433, 660-662, 852.]

(c) The District Court erred in finding that appellee performed the condition precedent set forth in Paragraph Second of the bond, that the obligee "shall faithfully perform all of the terms, covenants and conditions of such contract on the part of the Obligee to be performed;" [Findings VII, XXIII, XXVII, Tr. pp. 197, 206, 207-208.]

The evidence shows that appellee violated the terms of the subcontract, and particularly Article XVI thereof, by paying to or for the subcontractor on account of the subcontract work, large sums of money in excess of 90% of engineers estimates and 90% of useable materials in stockpile, and further violated said subcontract, and particularly Article XI thereof, by paying to or for the account of the subcontractor, on account of the subcontract work, large sums of money in excess of moneys due under the subcontract. [Tr. pp. 11-12, 879.]

(d) The District Court erred in finding that appellee complied with the condition precedent set out in Paragraph Second of the bond, that the obligee "shall also retain the last payment payable by the terms of said contract, and all reserves and deferred payments retainable by the Obligee under the terms of said contract, * * * unless the Surety shall consent, in writing, to the payment of said last payment, reserves or deferred payments." [Findings VII, XXIII, XXVIII, Tr. pp. 197, 206, 208.]

The evidence shows that appellee failed to retain said last payment, and failed to retain all or any reserves or deferred payments retainable by appellee under said subcontract, but on the contrary, paid to or for the subcontractor, on account of the subcontract work, large sums of money in excess of moneys due under the subcontract. There is no evidence that appellant consented to said payments. [Tr. pp. 11-12.]

3. The District Court erred in finding that appellant waived compliance by appellee with conditions precedent in the bond. [Finding XXXIII, Tr. p. 210.]

This finding is unsupported by the evidence.

There is no evidence to show or even indicate that appellant, intentionally or otherwise, relinquished any of its rights under the bond. [Tr. p. 504.]

4. The District Court erred in finding that appellant is estopped from asserting the failure of appellee to perform the conditions precedent contained in the bond. [Finding XXXIV, p. 211.]

This finding is unsupported by the evidence.

There is no evidence of any act, declaration or omission on the part of appellant which was acted on by appellee to its injury or otherwise.

5. The District Court erred in finding that appellee did not conceal from appellant the fact that the subcontractor was in default at the time the bond was accepted. [Findings XXIII, XXIX, Tr. pp. 206, 208-209.]

The evidence shows that the subcontractor was in default when the bond was accepted [Tr. pp. 571-572, 770-771, 41, 879], and that the first knowledge appellant had of any default of the subcontractor was

contained in the letter of April 5, 1945 from appellee to Duque & Frazzini, a copy of which was mailed to appellant. [Tr. pp. 463-464.]

6. The District Court erred in finding that the subcontract was not altered without the knowledge or consent of appellant. [Findings XXIII, XXX, Tr. pp. 206-209.]

The evidence shows that the subcontract was materially altered, particularly in the following respects:

(a) Appellee had control of, and did control and supervise, the manner in which the subcontract work was performed. [Tr. pp. 627, 41, 434-436, 638, 582, 322-323, 326-327, 436-438, 656-659, 605-607, 807, 587, 25, 617, 787, 568, 334-337, 433, 400.]

(b) Appellee paid to or for the account of Duque & Frazzini sums in excess of those provided by the subcontract. [Tr. pp. 23, 11-12.]

(c) Article XXIII, Item 11, of the subcontract was altered to change the basis of payment to Duque & Frazzini. [Tr. pp. 29, 80.]

(d) Article XXI, Section 7, of the subcontract was altered to change the maximum size of rock to be produced. [Tr. pp. 26, 876.]

7. The District Court erred in finding that appellee did not make premature payments to or for the account of the subcontractor. [Findings XXIII, XXXI, Tr. pp. 206, 209.]

The evidence shows that appellee paid to or for the account of the subcontractor, on account of the subcontract work, large sums of money

(a) prior to the date when any moneys were due the subcontractor on account of the subcontract work [Tr. pp. 41, 878, 879];

(b) in excess of moneys then due the subcontractor on account of the subcontract work. [Tr. pp. 41, 878, 879, 11-12.]

8. The District Court erred in finding that appellee did not waive any of its rights, nor elect to perform nor perform, any act inconsistent with the conditions of the bond. [Findings XIV, XXIII, XXXII, Tr. pp. 200, 206, 209.]

The evidence shows that when the subcontractor left the job on June 8, 1945, appellee, who had already moved in other equipment, elected to and did, without interruption, proceed with the completion of the subcontract work, instead of according to the surety the right, as required by the bond, to proceed or procure others to proceed with the performance of the subcontract. [Tr. pp. 661-663, 671-673, 593-594, 831-832, 850-852, 493, 495.]

9. The District Court erred in awarding to appellee interest prior to judgment. [Tr. pp. 211, 213-214.]

The evidence shows that the claim of appellee was unliquidated prior to judgment and therefore could bear no interest.

10. The District Court erred in admitting testimony of witness George J. Popovich concerning items alleged by appellee to have been paid out by it in connection with the subcontract, when the witness had no personal knowledge concerning the items, and was testifying from a summary of the said items as set forth in the bill of particulars, which summary was compiled by someone else, and the purported documents from which the bill of particulars was compiled were not in court and available to counsel for cross-examination, and were not shown to be admissible in evidence. [Tr. pp. 317-405.]

The witness testified as follows:

“Q. Referring to your bill of particulars, Mr. Popovich, which was introduced in evidence, Schedule I, Payroll—Duque & Frazzini, from February 11, 1945 to June 9, 1945, showing a total of \$38,979.65, subject to the corrections made this morning, will you state from what data or information that item was prepared? A. The items were prepared from weekly payrolls submitted by Duque & Frazzini.” [Tr. p. 323.]

This line of testimony was objected to by counsel for defendant:

“Mr. McCall: That is objected to, as the payrolls themselves would be the best evidence.

The Court: In the Federal Court, if the payrolls are available, a person who had charge of them can summarize.

Mr. Monteleone: We have the originals; if Mr. McCall desires the originals, they are in court.

The Court: So long as the originals are available for inspection, it is not necessary to produce them.

Mr. Monteleone: They have been inspected by the auditor for the defendant on many occasions.

The Court: I will allow you then to refer to this as a summary, it being understood that the originals are present and available to counsel. That is the Federal rule, and has been for many years.” [Tr. p. 323.]

The witness then testified from the bill of particulars concerning Schedules I to “XXXXIV,” inclusive, in substance, as follows:

That the figures shown in the schedules were taken from weekly payrolls and daily time cards furnished by Duque & Frazzini, equipment time

cards kept by the operators of the equipment, equipment records and memorandums, books of original entry, engineers estimates and engineering records, invoices, stock memorandums and other records; that these records were kept in the ordinary course of business; that in his opinion the charges set forth in the schedules were reasonable; as to most of the schedules, that the equipment and materials were used exclusively on the subcontract job, and in relation to each schedule that from the records he would state that, subject to any corrections made by plaintiff's attorney that morning as to certain schedules, the amounts set forth in the bill of particulars were correct according to those records. [Tr. pp. 323-360.]

Following the direct examination, the witness under cross-examination testified that he never was on the job at Tucson, that Homer Thompson was field manager, that all of the testimony he had given was taken from someone else's records and records kept in the home office which in turn were taken from records furnished the home office by someone in Tucson, and repeatedly admitted that records from which the figures in the bill of Particulars concerning which he had testified, were compiled, were not present in court. This fact was also admitted by plaintiff's counsel and confirmed by the court. [Tr. pp. 360-401.]

11. The District Court erred in finding that the terms of the subcontract to be performed by Duque & Frazzini became a part of the obligations contained in the bond.

The obligations of appellant must be measured by the terms of the contract to which it was a party, and not by the terms of some other contract to which it was not a party.

ARGUMENT.

I.

The Complaint Fails to State a Claim Upon Which Relief Can Be Granted.

The complaint incorporates by reference the subcontract and bond [Tr. pp. 4-5], copies of which are attached to the complaint as exhibits. [Tr. pp. 17-31, 32-36.]

The bond, in Paragraph Second, provides, among other things, that as a condition precedent to any right of recovery on the part of the obligee, it must comply with the terms of the subcontract [Tr. p. 34], and retain the last payment payable and all reserves and deferred payments retainable by the obligee under the subcontract. [Tr. pp. 34-35.]

The subcontract, Article XVI, provides that

“Partial payments for work performed under this agreement will be made by the contractor on the basis of 90% of engineers estimate and 90% of useable materials in stockpile.” [Tr. p. 23.]

The complaint, in Paragraph XVI, alleges that between the time the subcontract work commenced and the 8th day of June, 1945, plaintiff paid out to or for the account of the subcontractor \$36,456.41 in excess of the gross amount earned under the subcontract. [Tr. pp. 11-12.]

If appellee had paid only 90% of moneys earned by the subcontractor, and had retained the last payment and all reserves and deferred payments, it would have had on June 8, 1945 a surplus of money belonging to the sub-

contractor, instead of having paid \$36,456.41 in excess of the gross amount earned under the subcontract.

Civil Code of California, Section 2819, reads as follows:

“A surety is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the surety the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended.”

In the case of *Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co.* (1931), 214 Cal. 384, 5 P. (2d) 888, under similar facts, the court said, in part:

“In the present case, as we have seen, the plaintiff is relying and basing his right to recovery upon the \$1000 payment to Worswick, which the plaintiff contends was made within the contract, and therefore premature, and the trial court so found. Under these circumstances and the law as so established, it must be held that the premature payment altered the obligation of the principal under the contract, and that the surety was exonerated.” (See also cases therein cited.)

On the face of the complaint it is shown, therefore, that appellee made premature payments to or for the account of the subcontractor in the sum of \$36,456.41, which premature payments were contrary to the terms of the subcontract and directly contrary to the express provisions of the bond, necessarily resulting in the exoneration of the surety.

II.

Appellee Wholly Failed to Perform the Express Conditions Contained in the Bond, the Performance of Each of Which Is Made a Condition Precedent to Any Right of Recovery Thereon by the Obligee.

- (a) **Appellee Failed to Comply With the Condition Precedent Specified in Paragraph First of the Bond, Which Required Prompt Notice to the Surety of Any Default on the Part of the Principal.**

The pertinent part of the bond on the question of notice reads as follows:

“First: That in the event of any default on the part of the Principal, written notice thereof shall be delivered to the Surety, by registered mail at its office in the City of Los Angeles promptly, and in any event within ten (10) days after the owner, or his representative, or the architect, if any, shall learn of such default;” [Tr. p. 34.]

On March 7, 1945, the bond was amended to change the ten days appearing in Paragraph First to twenty days. [Tr. p. 462.]

The subcontract, Article II, required that work be commenced not later than February 19, 1945 [Tr. p. 19], which requirement appellee interpreted as meaning the commencement of production of materials. [Tr. p. 463.]

The subcontract, Article XXI, Section 5, required that the subcontractor erect two plants, each to produce 800 cubic yards of suitable material [Tr. p. 25], which requirement appellee interpreted to mean 800 cubic yards per day. [Tr. pp. 7, 463, 472-473.]

The subcontract, Article XXV, provided that

“It is mutually agreed that time is of the essence of this agreement, and that it contains the whole and entire understanding of the parties hereto, * * *.”
[Tr. p. 31.]

All of appellee's evidence on the subject is to the effect that the subcontractor did not commence the production of material on the 19th day of February, 1945 [Tr. pp. 463, 471-472, 571-572, 577, 597, 770-771], nor until some time after the 20th of February, 1945 [Tr. pp. 571-572, 577, 597, 770-771], did not erect two plants for the production of material [Tr. p. 465], and did not produce the minimum requirement of material under the subcontract, but produced less than fifty per cent thereof. [Tr. pp. 463, 465-466, 472-473, 598, 628-629.]

Carson Frazzini, whose deposition was taken by appellee, stated that production of material began about February 25th, 1945. [Tr. pp. 770-771.]

In his deposition, George W. Kovick testified that he was in the pit where the subcontract materials were to be produced, every day in February after the 11th, “Supervising work relative to the necessary production of material.” [Tr. p. 627.] He did not remember when the first material was produced. [Tr. p. 627.]

Nick L. Basich, treasurer and vice-president, and after March, 1945, president, and in both capacities general manager of Basich Brothers Construction Company [Tr. pp. 559-560], testified in his deposition, taken by appellant, that Duque & Frazzini started operating the first plant between the 20th and 25th of February, 1945 [Tr. pp. 571-572, 577, 597], and that when he wrote the letter

to Duque & Frazzini of April 5, 1945 he knew of his own knowledge that Duque & Frazzini did not commence the production of material on February 19, 1945. [Tr. pp. 596, 597.]

The letter from appellee to Duque & Frazzini dated April 5, 1945 [Tr. pp. 463-464] listed three separate failures on the part of Duque & Frazzini, each of which constituted default in the performance of the subcontract, to wit:

(a) That they did not start producing material on February 19, 1945;

(b) That they did not have two plants, as required by the subcontract;

(c) That they had not averaged 800 cubic yards of material per plant per day.

In letter addressed to Duque & Frazzini and appellant dated April 27, 1945, appellee referred to the subcontract and the letter of April 5, 1945 and stated that the subcontractor had failed to prosecute the work continuously with sufficient workmen and equipment, and instead of producing 800 cubic yards of suitable material per day, each of said plants had produced less than fifty per cent thereof [Tr. pp. 464-467], and in letter of May 23, 1945, to the subcontractor and appellant, appellee stated that each of said plants was producing an average of only approximately 300 cubic yards per day, and that the subcontractor had failed to maintain sufficient workmen and equipment to insure the completion of the work as provided in the subcontract. [Tr. pp. 471-473.]

Appellee had knowledge of all these facts and circumstances every day on and after the 19th day of February, 1945 [Tr. pp. 621, 627, 574], yet the very first intimation received by the surety that the subcontractor had not commenced the production of material within the time required by the subcontract, and had not erected two plants for the production of material as required by the subcontract, and had not produced the amount of material required by the subcontract, was when it received a copy of letter dated April 5, 1945 addressed to Duque & Frazzini. [Tr. pp. 463-464.] While this letter called the attention of Duque & Frazzini to their failure to commence the production of material as provided in the subcontract, and their failure to perform according to the terms of the subcontract, it did not purport to be a notice of default, but demanded that Duque & Frazzini move in additional and suitable equipment in order to produce the amount called for in the contract.

The law is clearly to the effect that where, as here, the bond expressly stipulates that the giving of prompt notice by the obligee of any default on the part of the principal shall be a condition precedent to any liability of the surety under the bond—no recovery can be had when the obligee fails to give such notice.

Civil Code of California, Section 2837, provides:

“In interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts. Except as provided in section 2794, the position of a surety to whom consideration moves is the same as that of one who is gratuitous.”

The question of notice was exhaustively considered in the case of *National Surety Co. v. Long* (C. C. A., 8th Cir.—1903), 125 Fed. 887. After reciting facts which showed that notice was not given in compliance with the terms of the bond, the court said, in part:

“The covenant of the plaintiff in the case under consideration was to immediately notify the surety company of any failure or inability of the contractor to construct and complete the building at the time and in the manner specified in the contract, and the question was not whether or not, although he failed to give the notice, he had exercised ordinary care to do so, but whether or not he had actually given the notice immediately upon the appearance of the known inability and failure of the contractor to perform his agreement.

* * * * *

The agreed time for the completion of the building was September 1, 1901. At that time the contractor had failed and was unable to perform his agreement in the time and manner there specified, and the plaintiff knew it. The latter had agreed, in such a case, to immediately notify the surety company of these facts, but he failed to do so until September 12, 1901. This failure was a clear breach of his covenants. ‘Immediately’ means without the intervention of other event; forthwith; directly. A notice 11 days after the known failure of a contractor to complete the performance of his agreement is not an immediate notice thereof, and it is not a compliance with the covenant and condition embodied in this contract. *Streeter v. Streeter*, 43 Ill. 155, 165.

* * * * *

The plaintiff had covenanted with the surety company in the bond that in the event of such inability or failure he would immediately notify the defendant, in writing, of that fact. He failed to fulfill this condition precedent to the liability of the company. That company was the surety of the contractor. If a condition of the liability of a surety known to the obligee is not complied with, the surety is discharged.

* * * * *

Again, this bond contains the mutual covenants of the parties—covenants by the surety company that Humphreys, the principal, should construct the building, and keep it free from liens; covenants by the plaintiff that, if Humphreys was unable or failed to perform the contract in the time and manner therein specified, he would immediately notify the surety, and that the latter might then take the contractor's place. The plaintiff failed to keep his covenant before the surety company had in any way failed to comply with those which it had made. On this account, he cannot enforce the fulfillment of the covenant of the defendant. He who commits the first substantial breach of a contract cannot maintain an action against the other contracting party for a subsequent failure on his part to perform. (Several cases cited.)

The plaintiff failed to comply with the conditions precedent upon which he knew and upon which he had agreed that the defendant contracted to be bound, and he committed the first substantial breach of the contract between them. On account of these facts, he was not entitled to recover anything of the defendant, under the evidence in this record, and the jury should have been instructed to return a verdict in favor of the surety company."

The case of *Union Indemnity Company v. Lang, et al.*, (C. C. A., 9th Cir.—1934—Cal.), 71 F. (2d) 901 is the leading case in this jurisdiction on the subject of conditions precedent contained in a surety bond. After reviewing the facts, very similar to the facts in this case especially on the question of notice, the court said, in part:

“Exactly one month before the appellees sent the first notification to the appellant that the subcontractor was not fulfilling its contract, Howard Lang, according to his own testimony, saw that Smith and McComber’s welding equipment was not, in his opinion, ‘sufficient to do three-quarters of a mile of welding per day on this 22 inch line.’

This was not a mere vague impression entertained by Lang, but was supported by definite data: ‘Smith and McComber had one tractor, a caterpillar tractor, but it had no crane or boom attachment on it with which to handle this pipe. In completing the welding work on Section 2 of the line, Lang Transportation Company used two 60 Best Caterpillars, and even that was not sufficient to enable the reasonable completion of three-quarters of a mile of welding of that 22 inch pipe per day.’

But the amazing record of the appellees’ failure to disclose the facts to the surety company antedates even Lang’s observation of the subcontractor’s deficiencies as to welding equipment.

Lang testified:

‘No welding work was performed by the subcontractors on Section 2 of the line during the month of April, 1929. They started to work in the early part of May and they started pretty slow. We kept after them. Of course we figured they were just get-

ting organized and they were still going pretty slow. Every time I was there I was just right after them to speed it up. * * *'

Again Lang testified:

"So we knew every day how much welding Smith and McComber had done. My father and I were in touch with the engineer for Pacific Gas and Electric Company, and, too, we had a general superintendent. * * *

We observed the organization which Smith and McComber had for doing the work, and the dispatch with which they prosecuted the work during the month of May. Their progress was slow. We noted that. And their organization seemed to be loose. * * *.'

Yet for more than five weeks from April 29, 1929, the day on which the subcontractor should have commenced its welding work, the appellees said not a word to the appellant.

It is contended, however, that 'The surety has not shown that it has been prejudiced in any way whatsoever because the appellees did not give notice prior to June 7, 1929.'

It therefore becomes necessary to inquire whether or not, when seasonable notice is made a condition precedent to the Surety's liability, the fact that the surety was not prejudiced by its failure to receive such notice is material. * * *

Early in the history of California jurisprudence, the Supreme Court of the state indicated its adherence to the principle of *strictissimi juris* in construing contracts in the nature of suretyships. In *Bensley v. Atwell*, 12 Cal. 231, 239, 240, the court said: 'Courts do not make contracts for men. They are supposed to be able to make contracts for themselves;

and we do not see, if a man chooses to bind himself to pay money on a particular event why he may not, also, as well give character to that event, and mark and describe it, and hold himself only bound by or after the event so defined; or, in other words, why, if he were only bound, upon eviction of his grantee, to pay money, he may not, by express agreement, limit the obligation to an eviction after reasonable notice to him. * * *

Nor does it matter of what value this notice was to the defendant, or whether it was of any value. In a Court of law, effect is to be given to the bargain according to its terms, and Courts of law cannot speculate upon the weight attached to one or another of the elements of an obligation. * * *

In *Schwab v. Bridge*, 27 Cal. App. 204, 206, 207, 149 P. 603, 604, the doctrine of *strictissimi juris* with reference to conditions precedent as to notice and other matters, was emphatically elaborated upon by the court: * * *

‘* * * it is equally true that parties to a contract may, if they think proper, agree that any matter shall be a condition precedent; and if words are used in the contract so precise, express, and strong that such intention only is compatible with the terms employed, a court can only give effect to such declared intention of the parties. The only question in every case is whether such intention is so declared; and where such intention is sufficiently expressed to make the fulfillment of the act a condition precedent, it will be one. 2 Elliott on Contracts, Sec. 1580; *National Surety Co. v. Long*, 125 Fed. 887, 60 C. C. A. 623.’ * * *

We believe that the decisions of the highest courts of California have recognized the principle of

strictissimi juris in connection with notice of default, breach, or any act or omission that might cause a loss for which the surety might become liable, regardless of whether or not the surety has been in fact prejudiced by failure to receive such notice.

Since, therefore, the appellees were well aware of the various acts and omissions of the subcontractor that might cause a loss for which the surety might become liable and for five weeks failed to notify the surety of such acts and omissions, we hold that the appellees failed to comply with a condition precedent of the bond, and cannot recover thereon."

- (b) Appellee Failed to Comply With the Condition Precedent Specified in Paragraph First of the Bond, That in the Event of Any Default on the Part of the Principal, and Notice Thereof, the Surety Should Have the Right Within Thirty Days After Receipt of Such Notice, to Proceed or Procure Others to Proceed With the Performance of the Contract.

Appellee contended that the subcontractor was not in default until on or about the 8th day of June, 1945. [Tr. pp. 239-240, 304-305.] Before that date appellee had already taken over the subcontract work and proceeded with its completion without interruption. [Tr. pp. 433, 660-662, 831-832, 852.]

The case of *Southern Surety Co. v. Chris Irving Plumbing & Heating Co.*, 184 Pac. 356 (Colo.—1919), involved a bond which gave the surety, in case of any default, the "right to assume and complete or procure the completion of said contract." No such right was accorded in that case, and the court said:

"That is not a mere technical violation of the bond; it is a substantial wrong. Possibly the surety

might have completed the work at less expense than was incurred for that purpose. Having deprived the surety of that right, secured by the agreement, defendant in error is in no position to demand reimbursement for the funds it paid out to complete the contract.”

(c) Appellee Failed to Comply With the Condition Precedent Specified in Paragraph Second of the Bond, Which Required:

“That the obligee shall faithfully perform all of the terms, covenants and conditions of such contract on the part of the Obligee to be performed;” [Tr. p. 34.]

1. Appellee failed to perform the provisions of Articles XVI and XI of the subcontract [Tr. pp. 23, 21] by paying to or for the account of the subcontractor in excess of 90% of engineers estimates and 90% of useable materials in stockpile, and in excess of moneys due under the subcontract. Paragraph XVI of the complaint alleges that during the period from the commencement of the subcontract work on or about February 19, 1945 to on or about June 8, 1945, appellee paid out for labor, supplies, materials and equipment \$36,456.41 in excess of the gross earnings under the subcontract. [Tr. pp. 11-12.]

2. Appellee failed to perform the provisions of Article XXI of the subcontract, and particularly Section 7 thereof, which reads in part:

“Rock furnished for Items 21 and 22 shall be 3” (three-inch) maximum; prices furnished by Duque & Frazzini on these Items are predicated on the 3” maximum rock.” [Tr. p. 26.]

by changing the maximum size of rock from 3" to 1½", without the knowledge or consent of appellant surety. [Tr. p. 876.]

3. Appellee failed to perform the provisions of the subcontract, Article XXIII, Section 11, which required measurements to be computed on truck water level. [Tr. p. 29.]

The Bill of Particulars, Schedule XXXIX, shows that Duque & Frazzini's production was measured by square yards and reduced to cubic yards. [Tr. p. 80.] Credits or payments were not based on truck water level measurement.

(d) Appellee Failed to Comply With the Condition Precedent Specified in Paragraph Second of the Bond, Which Required That the Obligee Retain the Last Payment Payable and All Reserves and Deferred Payments Retainable by the Obligee Under the Terms of the Subcontract:

On this point, the bond provides:

"That the Obligee * * * shall retain the last payment payable by the terms of said contract, and all reserves and deferred payments retainable by the Obligee under the terms of said contract until the complete performance by the Principal of said contract, and until the expiration of the time within which notice of claims or claims of liens by persons performing work or furnishing materials under said contract may be filed and until all such claims shall have been paid, unless the Surety shall consent, in writing, to the payment of said last payment, reserves or deferred payments." [Tr. pp. 34-35.]

A letter addressed by appellee to Duque & Frazzini and appellant May 24, 1945, reads, in part, as follows:

“* * * the amount of moneys due the subcontractors is not sufficient to meet the past advancements made by the contractor Basich Brothers Construction Company;” [Tr. p. 475.]

It is alleged in the complaint, Paragraph XVI, that as of June 8, 1945, appellee had paid out to or for the account of the subcontractor \$36,456.41 in excess of the gross amount earned under the subcontract. [Tr. pp. 11-12.]

There is no evidence to show that appellant consented, in writing or otherwise, to the payment to or for the subcontractor of the last payment or any reserves or deferred payments.

In *Schwab v. Bridge*, 27 Cal. App. 204, 149 Pac. 603, the court said:

“While it is true that conditions precedent are not favored by the law, and are to be strictly construed against one seeking to avail himself of them (*Antonelle v. Lumber Co.*, 140 Cal. 309-315, 73 Pac. 966), it is equally true that parties to a contract may, if they think proper, agree that any matter shall be a condition precedent; and if words are used in the contract so precise, express, and strong that such intention only is compatible with the terms employed, a court can only give effect to such declared intention of the parties. The only question in every case is whether such intention is so declared; and where such intention is sufficiently expressed to make the fulfillment of the act a condition precedent, it will be one. 2 Elliott on Contracts, §1580; *Nat. Surety Co. v. Long*, 125 Fed. 887, 60 C. C. A. 623.”

III.

Appellant Did Not Waive Its Right to Plead or Assert Any Failure of Appellee to Comply With Any of the Conditions Precedent Set Forth in the Bond, Nor Is Appellant Estopped From Pleading or Asserting the Failure of Appellee to Comply With Any of Said Conditions Precedent.

The evidence shows that the only representative of appellant who made any investigation was John Bray, from appellant's Los Angeles Office. His investigation was subsequent to April 5, 1945, after receipt of the first letter from appellee [Tr. pp. 463-464] intimating any failure of the subcontractor to comply with the terms of the subcontract.

Commenting on appellee's claim of waiver, predicated chiefly on the investigation made by Mr. Bray subsequent to April 5, 1945, Hon. Leon R. Yankwich, at the hearing on November 25, 1946 stated:

“Mr. Bray was merely an investigator. He was not an officer; he was not a person who entered into the contract, or modified the contract. He merely was somebody who went there to see something and report; so that is all the evidence there is upon which an alleged waiver is based.” [Tr. pp. 307-308.]

There is nothing whatsoever in the evidence to support the finding of the court that appellant waived any right under the bond, nor is there any evidence to show that it is estopped from asserting its rights thereunder. At no time in the course of the proceedings was appellee misled or lulled into a false sense of security by reason of any conduct of appellant.

The evidence shows that appellee refused to comply with appellant's request for information under date of ~~it is estopped from asserting its rights thereunder.~~ At June 7, 1945 in response to claims of appellee that Duque & Frazzini were not complying with the terms of the subcontract. [Tr. pp. 479-481, 497-499.]

The evidence further reveals that on June 7, 1945, appellant addressed a letter to appellee, through its attorney, which reads, in part, as follows:

"You of course realize that your client has no right to charge anything to the Surety, as the Surety has no liability whatever except such liability as may exist under the express terms of its bond." [Tr. p. 480.]

On June 23, 1945 appellant again wrote appellee:

"If you have wrongfully taken the contract over, as is indicated by your letters, or if you have failed to give notice required by the terms of the contract bond, or if you have failed in any other respect to perform any of the conditions precedent required of you by the terms of the bond, you can have no valid claim against the surety." [Tr. p. 504.]

It is apparent that appellee realized that its failure to comply with the conditions precedent contained in the bond precluded it from recovery thereunder, and attempted, as a last resort, to claim a waiver or an estoppel on the part of appellant. However, elements constituting either a waiver or an estoppel are entirely non-existent and are neither pleaded nor proven.

In an effort to circumvent appellant's defenses set forth in its first amended answer, appellee on January

5, 1947 filed amendments to its complaint, which amendments are set forth on pages 128 to 132 of the Transcript. The amendments to the complaint, by bald conclusions of law, assert that appellant waived any rights which it may have had by reason of any failure on the part of appellee to comply with the provisions of the bond. Also, by bald conclusions, the amendments to the complaint allege that appellant is estopped from asserting any rights it may have had by reason of the failure on the part of appellee to comply with provisions of the bond.

A cursory reading of the amendments to the complaint makes it at once apparent that neither a waiver nor an estoppel has been pleaded.

Appellant did not voluntarily nor intentionally relinquish any known right. In fact, it affirmatively communicated to appellee its intention to assert its legal rights.

In *McDanel v. General Insurance Co.*, 1 Cal. App. (2d) 454, 36 P. (2d) 829, it was contended that the defendant Insurance Company could not assert the defense of non-cooperation by its insured by reason of a purported waiver or estoppel. In rejecting such contention the court defines "waiver" as follows:

"To constitute a waiver there must be an existing right, a knowledge of its existence, and an actual intention to relinquish it, or such conduct as warrants an inference of the relinquishment. It is a voluntary act and implies an abandonment of a right or privilege—an election to dispense with something of value or to forego some advantage which one might, at this option, have demanded or insisted upon. In no case will a waiver be presumed or implied contrary to the intention of the party whose rights would be injuriously affected thereby, unless by his conduct

the opposite party has been misled, to his prejudice, into the honest belief that such waiver was intended or consented to. (25 Cal. Jur. 926-928.)”

See also:

Coolidge v. Standard Accident Insurance Co., 114 Cal. App. 716, 724, 300 Pac. 885 and cases cited.

In the present case, the conduct of appellant surety may not be construed to constitute a waiver. The intention of appellant to reserve its rights under the bond and its right to notice of any default as provided by the terms of the bond may not be doubted. The letters from appellant to appellee [Tr. pp. 480, 504] affirmatively stated that if appellee had failed in any respect to perform the conditions precedent required by the terms of the bond, it had no valid claim against the surety, and the conduct of appellant surety renders it indisputable that it did not intend to waive its rights under and pursuant to the terms of the bond.

Neither did appellant with full knowledge of essential facts which were unknown to appellee, conduct itself in such a manner as to deliberately mislead appellee. Hence, the elements of an estoppel are lacking.

The basis for the doctrine of estoppel is clearly set forth in *Lusitanian-American Development Company v. Seaboard Dairy Credit Corp.*, reported in 1 Cal. (2d) 121, at page 128, 34 P. (2d) 139, as follows:

“First: That the party to be estopped was apprised of the facts; second: That the party to be estopped must have intended that his conduct should be acted upon, and must have so acted that the party asserting the estoppel had a right to believe

it was so intended; third: That the party invoking the estoppel was ignorant of the true state of facts; and, fourth: That the party invoking the estoppel must have relied upon the conduct of the other party to his injury.”

Applying the foregoing principles to the instant case, the first element is lacking because appellant was not apprised of the facts. The second element is lacking because there is no evidence that appellant conducted itself in such a way as to mislead appellee. The third element is lacking because appellee was not ignorant of the true state of facts, but on the other hand had superior and first-hand knowledge of the true state of facts. The fourth element is lacking because appellee was not in anywise injured by reason of any conduct on the part of appellant. In fact, any injury to appellee was the direct result of its own acts contrary to the terms of the subcontract.

To the same effect as the hereinabove quoted cases see:

Goorberg v. Western Assur. Co. (1907), 150 Cal. 510, 89 Pac. 130;

Aronson v. Frankfurt Accident & Plate Glass Ins. Co. (1909), 9 Cal. App. 473, 99 Pac. 537;

Rice v. Fidelity & Deposit Co. (1900), C. C. A. 8th Cir., 103 Fed. 427;

Southern Surety Co. v. Chris Irving Plumbing & Heating Co. (1919), Colo., 184 Pac. 356;

Bank of America v. Pacific Ready-Cut Homes, 122 Cal. App. 554, 10 P. (2d) 478;

Stern v. Sunset Road Oil Co., 47 Cal. App. 334, 190 Pac. 651;

Verdugo Canon Water Co. v. Verdugo, 152 Cal. 655, 93 Pac. 1021;

Hacker Pipe & Supply Company v. Chapman Valve Manufacturing Company, 17 Cal. App. (2d) 265; 61 P. (2d) 944;

Silva v. Linneman, 73 Cal. App. (2d) 971, 167 P. (2d) 794;

General Motor Acceptance Corporation v. Gandy, 200 Cal. 284, 253 Pac. 137.

IV.

Appellee Concealed From Appellant the Fact That Duque & Frazzini Were in Default at the Time the Bond Was Accepted.

The evidence shows that the bond was dated February 20, 1945 [Tr. p. 35]; that the bond was not accepted until some time after its date [Tr. pp. 660, 607-608]; that under the terms of the subcontract material was to be produced commencing not later than the 19th day of February, 1945 [Tr. p. 19]; that no material was produced on the 19th day of February, 1945 [Tr. pp. 571-572, 577, 597, 770-771]; that all of the employees on the subcontract work were placed on the payroll of appellee as of the 11th day of February, 1945 [Tr. p. 41], and that appellee made advancements to or for the account of the subcontractor, commencing with the payroll for the period from February 11 to 17, 1945 [Tr.

pp. 41, 879] although no money was due the subcontractor under the terms of the subcontract until some time after the engineers estimate on March 31, 1945. [Tr. p. 878.]

The evidence further shows that George W. Kovick, General Superintendent of appellee, was in the pit where subcontract material was to be produced every day in February on and after the 11th [Tr. p. 627]; that the letter addressed to Duque & Frazzini by appellee, a copy of which was sent to appellant April 5, 1945 [Tr. pp. 463-464] was the first intimation which reached appellant to the effect that Duque & Frazzini were in default, and that all the facts above mentioned were well known to appellee at the time it accepted the bond. It was appellee's duty to have made known to appellant all of these facts before accepting the bond.

It is a universal rule that all parties to a suretyship relation must act toward each other with the utmost good faith.

In *Damon v. Empire State Surety Co.*, 146 N. Y. Supp. 996, the court said:

"At the same time it is well recognized that the obligee, before accepting the bond of the surety, is called upon to make such disclosure of facts within his knowledge, of which the concealment would amount to a *supresio veri*, and thereby become fraudulent, and it is not necessary that this concealment should inure to the benefit of the obligee, provided it operates to the prejudice of the surety."

The court in *Sherman v. Smith* (Iowa), 169 N. W. 216, in discussing such concealments, stated:

“It is elementary that fraudulent concealments on material matters are equivalent to affirming a fact which does not exist. Story, Equity, sec. 215; 2 Kent’s Commentaries, 483; Stearns on Suretyship, sec. 106. And the doctrine applies quite strictly in favor of sureties. ‘Thus, if a party taking a guaranty from a surety conceals from him facts which increase his risk, and suffers him to enter into the contract under false impressions as to the real state of facts, such concealment will amount to a fraud, because the party is bound to make the disclosure, and the omission to make it under such circumstances is equivalent to an affirmation that the facts do not exist.’ *Burke v. Wonterline*, 6 Bush (Ky.) 22.”

In the old leading case of *Franklin Bank v. Cooper*, 36 Me. 179, the court uses the following language:

“One, who becomes surety for another, must ordinarily be presumed to do so upon the belief, that the transaction between the principal parties is one occurring in the usual course of business of that description, subjecting him only to the ordinary risks attending it; and the party to whom he becomes a surety must be presumed to know, that such will be his understanding and that he will act upon it, unless he is informed, that there are some extraordinary circumstances affecting the risk. To receive a surety known to be acting upon the belief, that there are no unusual circumstances, by which his risk will be

materially increased, well knowing that there are such circumstances and having a suitable opportunity to make them known and withholding them, must be regarded as a legal fraud, by which the surety will be relieved from his contract.”

The *Restatement, Law of Security*, sets out the rule in Section 124:

“Where before the surety has undertaken his obligation the creditor knows facts unknown to the surety that materially increase the risk beyond that which the creditor has reason to believe the surety intends to assume, and the creditor also has reason to believe that these facts are unknown to the surety and has a reasonable opportunity to communicate them to the surety, failure of the creditor to notify the surety of such facts is a defense to the surety.”

Herein the evidence reveals that appellee accepted a bond from appellant without revealing that appellee had already breached the express conditions of the bond by making prepayments to or for the account of the subcontractor, and with full knowledge that the subcontractor had not started production on the scheduled date, and could not possibly fulfill the production requirements. Such concealments could only result in jeopardizing appellant's risk, and it is certain that had these facts been revealed, appellant would have rejected the undertaking. The situation is no different than that of a borrower procuring a loan without revealing to the lender liabilities which would render the loan hazardous.

V.

**The Subcontract Was Altered by Appellee Without
The Knowledge or Consent or Appellant.**

(a) The evidence shows that appellee had control of and did control and supervise the subcontract work, in the following respects:

1. Appellee supervised the work relative to the production of material from the very beginning. George W. Kovick, general superintendent of appellee, testified in his deposition as follows:

“Q. You say you were at the pit every day from February 11th during the month of February? A. Yes, sir.

Q. What kind of work were you superintending out there during that time? A. The entire project, the production of material and all work performed on the airport itself.

Q. But at and around the pit what kind of work were you performing? A. Supervising work relative to the necessary production of material.” [Tr. p. 627.]

2. Commencing with the payroll of February 11, to 17, 1945, all employees of Duque & Frazzini were carried on the payroll of appellee. [Tr. pp. 41, 879, 86-88.]

3. Bills for labor, equipment, materials and supplies were paid with the checks of appellee, which checks bore no identification mark to show that they were anything other than the obligations of Basich Brothers Construction Company. [Tr. pp. 434-439.]

4. Appellee named itself as employer of the men doing the subcontract work, in all withholding returns and withholding reports filed with the Internal

Revenue Department, in all Arizona State Employment Insurance returns, in all Social Security returns, and in all Workmen's Compensation and Public Liability and Property Damage policies. [Tr. pp. 86-88, 638, 582, 322-323, 436-438.]

5. On or about the 19th day of May, 1945, a conflict arose between appellee and the subcontractor as to who had authority to lay off the men on the subcontract job or continue them at work. Carson Frazzini gave orders that the men be laid off until the following Monday morning. George W. Kovick, appellee's general superintendent, countermanded the orders of the subcontractor and instructed the men to continue work, which they did. [Tr. pp. 656-659, 605-607.]

6. Appellee made certain repairs to equipment on the subcontract work, over the protests of Duque & Frazzini. [Tr. p. 807.]

7. Appellee dictated the site from which the subcontract materials were to be taken. [Tr. pp. 587, 25.]

8. Appellee set the rate of wages for the subcontract employees. [Tr. pp. 617, 786.]

9. Appellee rented from others, in its own name, equipment used on the subcontract work. [Tr. pp. 568, 332-346, 63, 66, 68, 69, 70, 71.]

10. Appellee, without obtaining the consent of the subcontractor, entered into a contract with P. D. O. C. in the sum of \$2,500.00, to have a crusher moved into the pit for the production of subcontract materials. [Tr. p. 433.]

In the case of *Stewart & Nuss, Inc. v. Industrial Accident Commission* (1942), 55 Cal. App. (2d) 501, 130 P. (2d) 985, the facts were very similar to the facts in this case.

In that case, there was a contract with the federal government for the surfacing and construction of a flying field. Stewart & Nuss, Inc., contracted with Dragline Rentals Co. to excavate sand. Stewart & Nuss, Inc., advanced each week to the Dragline Rentals Co. an amount equal to that company's payroll, such advancement to be deducted from any sums to become due the Dragline Rentals Co. Stewart & Nuss, Inc., kept a man at the sand pit to check the loads of gravel. Its foreman visited the pit several times a day, and all of the work was under the general supervision of an army engineer. Two of the men working at the pit were carried on the Stewart & Nuss, Inc., payroll. Time sheets were filled out for these men with the heading "Stewart & Nuss, Inc." left unchanged. The court said at page 988:

"* * * a part of the evidence, with the reasonable inferences therefrom, supports the conclusion that Stewart & Nuss, Inc., in their zeal to keep the work going and possibly because of the absence of Kuhn from the scene of the operations during most of the time, did many things which were not strictly in accordance with the terms of the contract and that it actually assumed and exercised a measure of control which must be held to have modified the terms of the contract, so far as material here. As was said in *Luckie v. Diamond Coal Co.*, 41 Cal. App. 468, 183 Pac. 178, 183; 'Accordingly, it has been held that, in an action of this character, while, *prima facie*, the relation of the parties to a written contract

of employment is that which is expressed by the terms of their writing, nevertheless, in order to determine their true relation, such contract should be considered in view, not only of the circumstances under which it was made, but of the conduct of the parties while the work is being performed'."

(b) The subcontract, Article XVI, provides for partial payments for work performed "on the basis of 90% of engineers estimate and 90% of useable materials in stock-pile." [Tr. p. 23.]

The evidence shows that appellee paid not only in excess of 90% of the amount so earned, but, according to the complaint appellee paid out between February 19, 1945 and June 8, 1945, \$36,456.41 in excess of the gross amount earned under the subcontract. [Tr. pp. 11-12.]

(c) Appellee's own evidence shows that Section 11 of Article XXIII of the subcontract was altered to change the basis of payment. Whereas the subcontract required that measurement be computed on truck water level [Tr. p. 29], a different yardstick entirely was used by appellee, as shown by the bill of particulars. [Tr. p. 80.]

(d) The subcontract, Article XXI, Section 7, provided as follows:

"Rock furnished for Items 21 and 22 shall be 3" (three-inch) maximum; prices furnished by Duque & Frazzini on these Items are predicated on the 3" maximum rock." [Tr. p. 26.]

On May 3, 1945, this section was altered to change the size of rock produced by the subcontractor from 3" to 1½" in a letter from appellee to Duque & Frazzini, and accepted by Duque & Frazzini. [Tr. p. 876.]

There is no evidence whatsoever that appellant consented to any of the above-mentioned alterations of the subcontract, or that appellant had knowledge of the said alterations.

The *Civil Code of California, Section 2819*, provides:

“A surety is exonerated, except so far as he may be indemnified by the principal, if by any act of the creditor, without the consent of the surety the original obligation of the principal is altered in any respect, or the remedies or rights of the creditor against the principal, in respect thereto, in any way impaired or suspended.”

The case of *United States v. Freel*, 186 U. S. 309, involved a change in the original contract. The court said:

“However, the proposition that the obligation of a surety does not extend beyond the terms of his undertaking, and that when this undertaking is to assure the performance of an existing contract, if any change is made in the requirements of such contract in the matters of substance without his consent, his liability is extinguished, is so elementary that we need not cite the numerous cases in England and in the state and Federal Court establishing it. Many of these cases will be found cited in the opinion of Thomas, J., in this case. 92 Fed. Rep. 229.

* * * * *

Coming then, to the question of the effect on the responsibility of the surety of the supplemental

agreement of August 17, we agree with the circuit court and the circuit court of appeals in holding that the alterations thereby caused were beyond the terms of the undertaking of the surety, and extinguished his liability.

* * * * *

In *Mundy v. Stevens*, 9 C. C. A. 366, 17 U. S. App. 442, 463, 61 Fed. 77, it was held by the circuit court of appeals of the third circuit that sureties for the payment by a contractor to a subcontractor of all moneys received for work under a government contract as provided in the contract were released by an alteration of such agreement whereby the right secured to the contractors to deduct from the monthly payments 3 cents per yard for material dredged, subsequently was modified so that payments of 2½ cents per cubic yard should be made monthly; and it was also held that, as the plaintiff had set forth the supplementary agreement in his statement of claim, he thereby made it part of his case, and the burden of proof that the change was consented to by the sureties was upon the plaintiff."

In *First Congregational Church of Christ in Corona v. Lowrey*, 175 Cal. 124, 165 Pac. 440, it is stated:

"Because of this finding that these changes were neither material nor detrimental to the surety the trial court gave judgment for plaintiff, and this appeal has followed.

* * * Our Code speaks with absolute finality upon the subject. Section 2819 of the Civil Code provides that a guarantor 'is exonerated, * * * if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect.' See, also, Civ. Code Sec. 2840, applying the same rule to sureties."

In the case of *McMannus v. Temple Estate Co.* (1936), 10 Cal. App. (2d) 419, 51 P. (2d) 1124, the court states:

"It is settled, however, that the parties to an obligation cannot materially alter its definite terms without a guarantor's consent, even though such parties in good faith believe it is to the guarantor's advantage to make the alteration. We are not required and under the law are not permitted to speculate whether the alteration benefits or injures the guarantor."

From the evidence herein, we find that not only was the subcontract altered without the knowledge or consent of appellant, by payment of moneys in excess of those provided therein, by changes in basis of payment and changes in size of material to be produced thereunder, but additionally we find that appellee, the obligee under the bond, actually stepped into the shoes of the subcontractor and occupied, as a practical matter, the dual position of a principal and obligee under appellant's bond.

Applying the foregoing statutory law to those facts, it necessarily follows that the surety was exonerated.

VI.

Appellee Made Premature Payments to or for the Account of the Subcontractor.

(a) The evidence shows that nothing became due under the subcontract until after the engineers estimate of March 31st, 1945. [Tr. pp. 23, 878.] The evidence further shows that appellee assumed payment for subcontractor's bills as of February 11th, 1945. [Tr. pp. 879, 41-57.]

At the hearing on November 25, 1945, addressing his remarks to plaintiff's attorney, Hon. Leon R. Yankwich said, in part:

"* * * I call your attention to the fact that under the defenses made, the amount of monies paid out to and for the benefit of the subcontractor by the contractor is made the basis for one of the most strongly argued points of the defense, that there was no liability, and that is the question of premature payments. It is conceded that some \$34,000.00 were prematurely paid; that is, that the payments exceeded 90 per cent, that at least \$4,000.00 was paid long before any money was even due." [Tr. pp. 292-293.]

The record shows that \$4,218.94 had been paid by appellee to or for the account of the subcontractor prior to March 7, 1945 [Tr. p. 879], that payments by appellee on account of the subcontractor's bills started as of February 11, 1945 [Tr. pp. 879, 41-44, 57], and before any payment whatsoever was due to the subcontractor, to wit, before March 31, 1945, thousands of dollars had been⁷¹¹² to or for the account of Duque & Frazzini. [Tr. pp. 879, 41-63, 66, 71-73.]

(b) The complaint, Paragraph XV, alleges that between the commencement of the subcontract work and

June 8, 1945, appellee paid out for labor, material, supplies and equipment on account of the subcontract work a total of \$85,172.63 [Tr. pp. 10-11]; paragraph XVI of the complaint alleges that between the commencement of the subcontract work on or about February 19, 1945 and June 8, 1945, the total amount earned under the subcontract was \$48,716.22, and that the difference between the amounts paid out by appellee and the gross amount earned by Duque & Frazzini during the said period was \$36,456.41. [Tr. pp. 11-12.]

In a *per curiam* opinion of the Supreme Court of California (1931), the question of premature payments was extensively reviewed in the case of *Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co.*, 214 Cal. 384, 5 P. (2d) 888. The plaintiff in that case contracted with Worswick to furnish labor and material for a memorial auditorium. The defendant wrote a bond for the faithful performance of the contract by the principal Worswick. The contract between plaintiff and Worswick provided that 75% of the valuation of all work installed should be paid monthly by plaintiff. The plaintiff advanced \$1000 to the principal who was in need of funds. The principal defaulted. The court said:

“The plaintiff completed Worswick’s contract, expending a sum greatly in excess of the original contract price, and sued the defendant in this action on its bond. The trial court found, among other things, that prior to the abandonment by Worswick of his contract the plaintiff had paid to Worswick at least 75 per cent of the value of the work completed under the contract up to that time and the plaintiff had complied in all respects with its obligations under said contract; that the plaintiff, in accordance with the contentions, and

evidence produced in support thereof, had advanced to Worswick the sum of \$1,000 without a certificate of work done, for the purpose of enabling said Worswick to carry on his work under the contract; and that it was not true that said contract had been canceled or rescinded. Judgment for the plaintiff in the sum of \$5,000 and interest was entered."

Among the defenses introduced by the Surety was the following:

"* * * that the \$1,000 note transaction between Worswick and the plaintiff, without the knowledge or consent of the defendant, exonerated the defendant from any liability under its bond."

On this point the court said:

"The defendant contends that it is established by the authorities cited by it that a premature payment is a material alteration of the contractual obligation which will exonerate the surety without any inquiry into the question whether the surety has been prejudiced thereby. It is the position of the plaintiff that there is authority in point in this state which establishes that the premature payment will not exonerate the surety if it has not prejudiced its rights.

The case first relied upon by the defendant is *Calvert v. London Dock Co.*, 2 Keen 638, 48 Eng. Rep. Full Reprint 774, where the contractor abandoned the work and the obligee completed it and sued at law to recover from the contractor and his sureties. The sureties, by a bill in equity, sought to be relieved of liability under their bond on the ground 'that the

company (the obligee) until the entire performance of the contract, would have retained in their hands, so much of the contract price, as by the contract, they were entitled to retain, as a security for the performance of the rest of the contract; and that by advancing to Streather more than they were bound to do, the company deprived the plaintiffs of the benefit of that security, and thereby, in equity, released them from the bond.' It was there said: 'The argument however, that the advances beyond the stipulations of the contract were calculated to be beneficial to the sureties, can be of no avail. In almost every case where the surety has been released, either in consequence of the time being given to the principal debtor, or of a compromise being made with him, it has been contended, that what was done was beneficial to the surety—and the answer has always been, that the surety himself was the proper judge of that—and that no arrangement, different from that contained in his contract, is to be forced upon him; and bearing in mind that the surety, if he pays the debt, ought to have the benefit of all the securities possessed by the creditor, the question always is, whether what has been done lessens that security. * * * What the company did, was perhaps calculated to make it easier for Streather to complete the work, if he acted with prudence and good faith; but it also took away that particular sort of pressure, which by the contract, was intended to be applied to him. And the company, instead of keeping themselves in the situation of debtors, having in their hands, one-fourth of the value of the work done, became creditors to a large amount, without any security; and under the circumstances, I think, that their situation with respect to Streather, was so far altered, that the sureties must be considered to be discharged from their suretyship.'

In *Bragg v. Shain*, 49 Cal. 131, it was held that the use of some \$5,000, out of a fund to be retained amounting to over \$9,000, in paying off liens prior to the time when the obligee was authorized to do so, operated to release the surety, and a judgment against the latter was reversed. In a brief opinion the court expressly followed *Calvert v. London Dock Co.*, *supra*, holding that the case before it was not distinguishable in principle from that case and *Taylor v. Jeter*, 23 Mo. 244. In the latter case the money required to be retained was paid prematurely directly to the contractor who failed to apply it to lien claims for labor and materials of which the obligee previously had notice. The court there relied on *Calvert v. London Dock Co.*, *supra*, in affirming a judgment for the surety on the ground that 'the owner having notice of them (the liens), and paying what by the substantial terms of the contract he was entitled to retain until they were removed, voluntarily abandoned an ample fund, which, according to the conditions of the contract, was to accumulate in his own hands as the primary security for its due performance, and in which the surety had an equal interest with himself. He must, therefore, bear the loss occasioned by his own negligence or folly.' "

The opinion closed with the following statement:

"Under these circumstances and the law as so established, it must be held that the premature payment altered the obligation of the principal under the contract, and that the surety was exonerated."

VII.

Appellee Made an Election on or Prior to June 8, 1945 to Complete the Subcontract Work, Instead of Giving Notice to Appellant as Required in the Bond, and According It the Right to Proceed or Procure Others to Proceed With the Performance of the Subcontract.

If Duque & Frazzini were in default on or after the 19th day of February, 1945, and if appellee failed to give to appellant notice of such default as required by the terms of the bond, all of which appellant claims the evidence shows, the surety was exonerated.

Assuming, for the purpose of this argument only, that Duque & Frazzini were not in default prior to the 8th day of June, 1945, as contended by counsel for appellee at the pretrial hearing before Hon. Peirson M. Hall, on the 8th day of July, 1946 [Tr. pp. 239-240], and as contended at the hearing before Hon. Leon R. Yankwich on the 25th day of November, 1946, at which time the court, addressing appellee's attorney, stated, in part:

“On the basis of allegation of certain facts in the case the defendants allege that they were in default. In your brief you take definitely the position that it was no default until there was an abandonment of the work; an abandonment on the 8th of June.

Mr. Monteleone: I don't think there was a default. I took the position that there were partial defaults.” [Tr. pp. 304-305.]

—assuming these facts to be true, appellee had the election, upon the default of Duque & Frazzini to immediately take over the contract and complete it, and thereby waive any recourse against the surety on the bond, or to prompt-

ly give notice to the surety under the terms of Paragraph First of the bond and accord it the right, within thirty days, to proceed or procure others to proceed with the performance of the subcontract. [Tr. p. 34.]

With these two alternatives before it, appellee elected to and did immediately take over and complete the subcontract work. [Tr. pp. 661-663, 671-673, 593-594, 831-832, 850-852, 493, 495, 497-499, 500-502.]

This act on the part of appellee was wholly inconsistent with any right which it could possibly have under the terms of the surety bond. Appellant was surety for the faithful performance of Duque & Frazzini, not for the faithful performance of appellee. In other words, appellee could not be both principal and obligee under the bond.

It will be noted that at the very time appellee sent to appellant the letters dated June 9, 1945 and June 11, 1945 [Tr. pp. 497-499, 500-502] appellee had, according to its own statements, already taken over the subcontract work. Those letters also show that appellee was cognizant of the rights of the surety under Paragraph First of the bond, and was wilfully violating those rights.

On June 23, 1945, appellant wrote to appellee, in part, as follows:

“If you have wrongfully taken the contract over, as is indicated by your letters, or if you have failed to give notice required by the terms of the contract bond, or if you have failed in any other respect to perform any of the conditions precedent required of you by the terms of the bond, you can have no valid claim against the surety.” [Tr. p. 504.]

Appellant contends that if appellee had any right to call on the surety under the terms of the bond on or about

June 8, 1945, it waived that right by electing to take over and complete the subcontract.

In the case of *Albert Lea Foundry Co. et al. v. Iowa Savings Bank of Marshalltown, Iowa*, 21 F. (2d) 515, 519, the court said:

“A party cannot occupy inconsistent positions in the same matter. In *Robb v. Vos*, 155 U. S. 13, 15 S. Ct. 4, 39 L. Ed. 52, the court held that, when a party has two remedies inconsistent with each other, any decisive act by him, done with knowledge of his rights and of the facts, determines once and for all his election of his remedy. And in *Thompson v. Howard*, 31 Mich. 309, 312, it was held that, where a party once makes his election between inconsistent positions, he is thereafter precluded from going back and electing again.”

The court said, in the case of *In re Miller Rose Co.*, 36 F. (2d) 203, 206:

“Where one has two inconsistent remedies, he must make his election which one he will pursue, and, having elected may not have recourse to the other remedy.”

Appellee had the right, under the bond, to notify appellant of any default by appellant's principal, whereupon appellant, if it so chose, could itself or through someone it selected, fulfill the performance under the subcontract. On the other hand, appellee could undertake to complete the work itself and forego any rights it might have under the bond. Appellee chose the latter course. Having made its election, appellee is in no position now to re-elect, ignore all conditions precedent, and seek monetary damages against appellant because its first election proved unwise.

VIII.

Appellee's Claim Was Unliquidated, and Could Not Bear Interest Prior to Judgment.

The evidence shows that appellee's claim was uncertain and unliquidated until the date of the judgment.

The verified complaint alleges that up to June 8, 1945 the earnings under the subcontract amounted to \$48,716.22 [Tr. p. 11], and that up to that date appellee paid out for labor, supplies, materials and equipment on account of Duque & Frazzini \$85,172.63 [Tr. p. 11], leaving a difference between said earnings and expenditures of \$36,456.41. [Tr. p. 12.] The court found, that up to June 8, 1945 the earnings under the subcontract were \$56,080.11 [Tr. p. 202], that up to June 8, 1945 appellee expended in performance of the subcontract work \$85,946.50 [Tr. p. 202], leaving a balance due plaintiff of \$29,866.39. [Tr. p. 203.]

The complaint further alleges that from June 8, 1945 to completion of the job appellee paid out \$118,278.03 [Tr. p. 14], and that the earnings based on the subcontract during that period were \$76,230.73 [Tr. p. 15], leaving a difference between said earnings and expenditures of \$42,047.30. [Tr. p. 15.] The court found, that from June 8, 1945 to completion of the job appellee paid out \$115,470.36 [Tr. p. 204], and that gross earnings based on the subcontract from June 8, 1945 were \$65,753.84 [Tr. p. 205], leaving a balance due plaintiff of \$49,716.52. [Tr. p. 205.]

The complaint alleges that the balance due appellee is \$78,503.71, which is the amount prayed for. [Tr. p. 16.] Appellee's verified bill of particulars alleges a balance of \$79,290.09. [Tr. p. 40.] The court found the amount

of the balance to be \$79,582.91 [Tr. p. 206] after plaintiff had admitted in open court on February 4, 1947 errors and overcharges in the bill of particulars totaling hundreds of dollars. [Tr. pp. 314-317, 345-346.]

A letter addressed to appellee's attorney by appellant's attorney on October 8, 1946 [Tr. pp. 125-127] pointed out some of the inconsistencies and errors in appellee's verified bill of particulars, and at the next hearing in open court on October 14, 1946 appellee's attorney filed with the clerk what purported to be a reply to the letter of October 8, 1946, which admitted errors and overcharges in the bill of particulars. [Tr. pp. 127-128.]

A further memorandum pointing out many errors and inconsistencies in the bill of particulars [Tr. pp. 146-186] was served on appellee January 31, 1947 and filed on February 4, 1947. [Tr. p. 186.] In open court on February 4, 1947, appellee's attorney admitted errors and overcharges in the bill of particulars totaling hundreds of dollars [Tr. pp. 314-317], and appellee's witness George J. Popovich when he was being examined by appellee's attorney called attention to a further overcharge concerning the items shown in the bill of particulars of \$21.00. [Tr. pp. 345-346.]

Among the items which appellee's attorney requested be eliminated from the bill of particulars was a claim for public liability and property damage insurance, which appears in Schedule VI of the bill of particulars as amended. [Tr. p. 121.] It is interesting to note that appellee withdrew its claim on this item only after the policy was demanded in Notice to Produce June 27, 1946 [Tr. pp. 84-86], further demanded on July 8, 1946 [Tr. pp. 225-227], its production ordered by the court July 8, 1946

[Tr. p. 235], again ordered by the court on October 14, 1946 [Tr. p. 248], and again on November 7, 1946 [Tr. pp. 276-277], and when it was finally produced, appellee's counsel admitted that it did not cover the subcontractor. [Tr. p. 317.]

The rule regarding allowance of interest is stated in the case of *Perry v. Magneson* (1929), 207 Cal. 617, 279 Pac. 650, as follows:

“As to the time from which interest on the amount found due should have been allowed, respondent asserts that the trial court was correct in awarding interest from the date of the commencement of the suit, on the theory that the action was not one for damages but was upon an obligation to pay a sum certain, which obligation must be treated as any other instrument calling for the payment of money. The general rule is that interest is allowable from the time the sum in suit becomes due, if the sum is certain or can be made certain by calculation. The test, then, to be applied in the instant case is whether or not the sum found to be due was known and admitted by the appellant to be due to the respondent. (*Gray v. Bekins*, 186 Cal. 389, 399 (199 Pac. 767).) It is apparent that, until the trial court determined the cost of completing the building, based upon the reasonable value of the necessary labor and materials, the amount, if any, due from appellant to respondent upon the bond in question could not be fixed. Had the cost to respondent not exceeded the amount specified in the building contract for the completion of the work, the surety would not have been liable in any sum. * * * It was necessary, therefore, for the respondent to prove a loss before he would be entitled to recover on the bond; and it follows that,

until the amount of that loss should be determined by the judgment of the court, the claim was uncertain and unliquidated. As was said by this court in *Cox v. McLaughlin*, 76 Cal. 60, 67 (9 Am. St. Rep. 164), 18 Pac. 100, 104, 'The reason of such denial of interest is said to be that the person liable does not know what sum he owes, and therefore can be in no default for not paying. The damages in such cases are an uncertain quantity, depending upon no fixed standard, * * * and can never be made certain except by accord or verdict. As to such damages there can be no default, and hence the initial point at which to fix the starting of interest is wanting.' It follows, therefore, that respondent was not entitled to interest prior to the entry of judgment, and to that extent the judgment was erroneous."

And the court said in *Indemnity Ins. Co. of North America v. Watson, et al.* (1933), 128 Cal. App. 10, 16 P. (2d) 760, 765:

"The general rule with respect to the allowance of interest is that, where there is no contract to pay interest, the law awards interest upon money from the time it becomes due and payable, if such time is certain and the sum is certain or can be made certain by calculation. *Gray v. Bekins*, 186 Cal. 389, 399, 199 Pac. 767; *Perry v. Magneson*, 207 Cal. 617, 623, 279 Pac. 650; 14 Cal. Jur., p. 678. Having in mind the theory upon which the case was tried and the fact that with respect to certain items contained in the schedule of charges appearing in the com-

plaint, the amounts of such items were in dispute, and the proof produced at the trial showed such amounts to be in excess of the amounts properly due, we have arrived at the conclusion that the court was justified in refusing to advise the jury that it might make an allowance for interest. The test to be applied is whether or not the exact sum found to be due was known and admitted by defendant to be due to plaintiff. *Gray v. Bekins, supra*. When this test is applied, it is apparent that not until the trial of the action was it ascertained or could it have been ascertained that a certain definite sum was due from defendant to plaintiff.”

The court herein awarded monetary damages in excess of those sought in appellee’s complaint. Additionally, the judgment provides interest on the sum of \$29,-866.39 from June 8, 1945 and interest on \$49,716.52 from September 25, 1945, to and including February 28, 1947, said interest amounting to the sum of \$8,-557.49. The basis upon which the court determined the dates from which interest should run is not revealed in the record. Until the court did determine that the surety was liable on its undertaking, and further determined what items were properly chargeable against appellant surety, the claims remained unliquidated. The majority of the claims were based upon an alleged reasonable value, and under the established rules as exemplified by the aforequoted authorities, the judgment herein should not bear interest prior to the date it was rendered.

IX.

The District Court Erred in Admitting Testimony of George J. Popovich Concerning Items Alleged by Appellee to Have Been Paid Out by It in Connection With the Subcontract, When the Witness Had No Personal Knowledge Concerning the Items, and Was Testifying From a Summary of the Said Items as Set Forth in the Bill of Particulars, Which Summary Was Compiled by Someone Else, and the Purported Documents From Which the Bill of Particulars Was Compiled Were Not in Court and Available to Counsel for Cross-Examination, and Were Not Shown to Be Admissible in Evidence.

All of the testimony of appellee's witness George J. Popovich [Tr. pp. 317-405] was based on a false foundation. He was permitted to testify from the bill of particulars over the objection of counsel for appellant, only after the witness and appellee's attorney had assured the court that the original payrolls were present and available to opposing counsel. This assurance was later proved to be erroneous.

The question, the objection, the comments and the ruling of the court therein appear in the record as follows:

"Q. Referring to your bill of particulars, Mr. Popovich, which was introduced in evidence, Schedule I, Payroll—Duque & Frazzini, from February 11, 1945 to June 9, 1945, showing a total of \$38,979.65, subject to the corrections made this morning, will you state from what data or information that item was prepared? A. The items were prepared from weekly payrolls submitted by Duque & Frazzini." [Tr. p. 323.]

This line of testimony was objected to by counsel for appellant:

“Mr. McCall: That is objected to, as the payrolls themselves would be the best evidence.

The Court: In the Federal Court, if the payrolls are available, a person who had charge of them can summarize.

Mr. Monteleone: We have the originals; if Mr. McCall desires the originals, they are in court.

The Court: So long as the originals are available for inspection, it is not necessary to produce them.

Mr. Monteleone: They have been inspected by the auditor for the defendant on many occasions.

The Court: I will allow you then to refer to this as a summary, it being understood that the originals are present and available to counsel. That is the Federal rule, and has been for many years.” [Tr. p. 323.]

It is evident that the witness would not have been permitted to testify regarding the items in the various schedules which made up the bill of particulars, if he had not misrepresented to the court that the originals were present. It was the attorney for appellee who stated that the originals were in court. The witness misrepresented the facts by his silence. It was the witness whom the court addressed as follows:

“I will allow you then to refer to this as a summary, it being understood that the originals are present and available to counsel.” [Tr. p. 323.]

It is also evident that the statements of counsel for appellee that the bill of particulars had been introduced

in evidence, and that the original documents had been inspected by the auditor for appellant on many occasions, were erroneous and not supported by the record.

After the ruling of the court, the witness proceeded to testify regarding the items making up Schedules I to "XXXXIV" of the bill of particulars, in substance, as follows:

That the figures shown in the schedules were taken from weekly payrolls and daily time cards furnished by Duque & Frazzini, equipment time cards kept by the operators of the equipment, equipment records and memorandums, books of original entry, engineers' estimates and engineering records, invoices, stock memorandums and other records; that these records were kept in the ordinary course of business; that in his opinion the charges set forth in the schedules were reasonable; as to most of the schedules, that the equipment and materials were used exclusively on the subcontract job, and in relation to each schedule that from the records he would state that, subject to any corrections made by plaintiff's attorney that morning as to certain schedules, the amounts set forth in the bill of particulars were correct according to those records. [Tr. pp. 323-360.]

On cross-examination, the witness testified:

"Q. (By Mr. McCall): Mr. Popovich, were you ever on the job at Tucson, Arizona? A. No.

Q. Then all the information or testimony you have given here, you got it from records submitted to you by someone else, is that right? A. From someone else's records, and records we kept in the home office.

Q. And the records which you kept in the home office were in turn taken from records given to you

by somebody else in Tucson, is that right? A. Yes, and also submitted by the home office to Tucson.” [Tr. p. 360.]

The witness further testified that he never saw time cards prepared by Duque & Frazzini, as he was never on the job [Tr. p. 368]; that Homer Thompson was manager of the field office. [Tr. p. 369.]

After the witness had testified that he had before him all the payroll sheets from January 29, 1945 to October 13, 1945, the date the job was finished [Tr. p. 361], he was requested to demonstrate to the court how the bill of particulars was made up from the records of appellee. To this he replied: “We don’t have all the necessary data to do that.” [Tr. pp. 384-385.] When the witness had for a long time evaded the questions of counsel for appellant, the court finally stated to him: “Counsel wants to know if you have any weekly sheet.” [Tr. p. 389.] Counsel for appellee, without waiting for the witness to answer, said: “No, I don’t think we have.” [Tr. p. 389.] The Court then remarked: “Let us go on. It is quite evident he does not have all the information here.” [Tr. p. 389.]

The following excerpts from the testimony of the witness further show that the documents of which the bill of particulars purported to be a summary, were not in court:

“Q. (By Mr. McCall): And that is the same with reference to the comment we have made on Schedule No. III, is it not? If you will refer to

your comments, Mr. Popovich? A. Yes, sir, that is true for No. III. We don't have all the records here with us.

Q. And also for No. IV, No. V? A. We don't have all the records here for IV or V." [Tr. p. 389.]

"Q. Beginning with Schedule No. VII of your Bill of Particulars, Mr. Popovich, Equipment Rentals, you testified this morning that those schedules were made up—Schedule No. VII was made up by equipment time cards signed by each employer.

Mr. Monteleone: Each employee. A. By each employee.

Q. (By Mr. McCall): And the time cards signed by him and the foreman. Do you have in court all the time cards making up Schedule No. VII? A. I don't have all the time cards here at all, sir.

Q. Do you have any time cards from which you made up Schedule No. VII? A. Not with us here." [Tr. p. 391.]

"Q. Beginning with Item 2/26/45, page 1 of your Schedule XXX, in the amount of \$33.69, can you tell how that labor is made up? A. \$33.69?

Q. Yes. A. We can tell that by our time cards, and other records we don't have here available.

Q. Do you have any records available in court today from which you made up Schedule No. XXX? A. We don't have all the records here.

Q. Do you have any of them here? A. No, we would have to have our work papers to compute that." [Tr. p. 396.]

No books or records of any kind from which the bill of particulars was purportedly compiled, were offered by appellee in evidence, or even for identification.

The applicable rule is tersely stated in the case of *People v. Doble*, 203 Cal. 510, 514, 265 Pac. 184, as follows:

“It is manifestly error to admit in evidence, under section 1855, subdivision 5, of the Code of Civil Procedure, a summary of books where the books themselves are not shown to be admissible in evidence. We, of course, are not intending to hold that the books in each case must be actually received in evidence to warrant the introduction of such summary so long as they are available for use of the opposing party, but their introduction in evidence is the safest rule, and it is not a technical objection to require that a showing be first made that such book entries are entitled to admission if they are actually offered. This we understand to be the effect of such cases as *Shields v. Rancho Buena Ventura*, 187 Cal. 569 (203 Pac. 114).

Further, it will be seen that a more serious error was committed when it is recalled that appellant was in nowise connected with the said entries, it being expressly admitted that he had no knowledge whatsoever of the books and had no custody or control whatsoever over them. The entries were not made by Cox and were therefore at most the acts of sub-agents and ordinarily would not be binding even in a civil action on appellant (Civ. Code, secs, 2349-2351).”

X.

The Obligations Assumed by the Surety Are to Be Measured Only by the Terms of the Bond to Which It Became a Party, and Not by the Terms of some Other Contract to Which It Was Not a Party.

That question was before this Court in the case of *Pacific Automotive Device Co. v. United States Fidelity and Guarantee Co.*, 15 F. (2d) 164, 165 (C. C. A., 9th Cir.—1926). In that case suit was brought against the surety on the contract alone. The Court said, in part:

“* * * the contention that a surety on such a bond becomes a party to the original contract between the principal and the obligee in the bond and assumes all obligations of that contract, regardless of the conditions, provisions, and limitations contained in the bond or indemnity contract, finds no support in reason or authority. The contract of the defendant in error was one of indemnity only, and the obligation it assumed must be measured by the terms of the indemnity contract to which it was a party, not by the terms of some other contract to which it was not a party.”

Conclusion.

More than six-sevenths of the record in this case is made up of depositions and exhibits, and this Honorable Court is in as good position to weigh and evaluate the evidence as was the District Court.

For the most part, the evidence is without conflict, and presents questions of law rather than questions of fact.

To recapitulate, the grounds upon which appellant urges that the judgment of the District Court be reversed, are:

1. The complaint clearly shows that appellee has no valid claim under the terms of the bond, upon which relief can be granted.

2. Appellee failed to comply with any of the express conditions contained in the bond, the performance of each of which was made a condition precedent to any right of recovery thereon by appellee.

3. Appellee failed to plead or prove facts constituting either a waiver on the part of appellant of the conditions precedent contained in the bond, or conduct on the part of appellant amounting to an estoppel to assert appellee's failure to comply with conditions precedent contained in the bond.

4. Appellee concealed from appellant material facts, which facts were known to appellee at the time it accepted the bond, and were unknown to appellant.

5. The subcontract was materially altered without the knowledge or consent of appellant.

6. Appellee made premature payments to or for the account of the subcontractor.

7. Appellee irrevocably elected its remedy, in undertaking to complete the subcontract itself rather than giving notice to appellant under the provisions set out in the bond.

8. The District Court erroneously awarded interest to appellee on an unliquidated claim, prior to judgment.

9. The District Court committed error prejudicial to the substantial rights of appellant, in permitting a witness

unfamiliar with the items, to testify from a summary, over timely objection, to items of account upon which the judgment was predicated, when the purported documents from which the summary was compiled were not in court and available to counsel for cross-examination.

For the foregoing reasons, appellant earnestly urges that the judgment of the District Court be reversed and the cause remanded to the District Court with instructions to enter judgment in favor of appellant.

Respectfully submitted,

JOHN E. McCALL,

Attorney for Appellant.

ROBERT E. FORD,

JOSEPH J. BURRIS,

Of Counsel.



No. 11658
IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,
Appellant,
vs.

BASICH BROTHERS CONSTRUCTION COMPANY, a corpora-
tion,
Appellee.

APPELLEE'S BRIEF.

FILED
JUL 1 1947
PAUL P. O'BRIEN,
CLERK

STEPHEN MONTELEONE,
TRACY J. PRIEST,
714 West Olympic Boulevard, Los Angeles 15,
Attorneys for Appellee.



TOPICAL INDEX

	PAGE
Statement of jurisdiction.....	1
Statement of facts.....	1
Argument	7

I.

Answer to appellant's contention, first, that the complaint fails to state a claim upon which relief can be granted; and secondly, that appellee made premature payments.....	7
---	---

II.

Answer to appellant's contentions.....	13
A. That appellee failed to comply with the condition precedent of the bond by first failing to notify appellant that the work was not commenced by February 19, 1945, and, secondly, that the subcontractors did not erect two plants each to produce 800 cubic yards per day.....	
	13
B. That appellee failed to comply with the condition precedent of the bond in that it had the right within 30 days after notice of abandonment of the work by the subcontractors to proceed or procure others to proceed with the performance of the contract.....	
	16
C. That appellee violated a condition precedent: (1) first, by changing size of rock; (2d) second, by changing method of measurement.....	
	19

III.

Answer to appellant's contention that it did not waive nor is it estopped from asserting its right to plead any alleged failure on the part of appellee to comply with any of the conditions precedent of the bond.....	20
---	----

ii.

PAGE

IV.

Answer of appellant's contention that appellee concealed from appellant the fact that Duque & Frazzini were in default at the time the bond was accepted.....	25
---	----

V.

Answer to appellant's contention that subcontract was altered by appellee without its knowledge or consent.....	27
---	----

VI.

Answer to appellant's contention that appellee made premature payments	30
--	----

VII.

Answer to appellant's contention that appellee made an election on or prior to June 8, 1945, to complete the subcontract work, instead of giving notice to appellant as required in the bond and according it the right to proceed or procure others to proceed with the performance of the subcontract.....	30
--	----

VIII.

Appellee is entitled to recover interest.....	32
---	----

IX.

Trial court did not err in permitting George J. Popovich to testify in reference to items in bill of particulars.....	36
---	----

X.

Answer to appellant's contention that surety's obligation measured only by terms of bond.....	41
Conclusion	41

iii.

TABLE OF AUTHORITIES CITED

CASES	PAGE
Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567.....	18
Antonelle v. Lumber Co., 140 Cal. 309, 73 Pac. 966.....	16
Ash v. Soo Sing Lung, 177 Cal. 356.....	18
Basich Brothers Construction Co. v. United States of America for the use of Turner, et al., Case No. 11353 (U. S. C. C. A., 9th)	11
Burlingham v. Gray, 22 Cal. (2d) 87.....	29
Burr v. Gardella, 53 Cal. App. 377.....	10, 12
California Cotton, etc. Assn. v. Byrne, 58 Cal. App. (2d) 340....	18
Christie v. Commercial Casualty Co., 6 Cal. App. (2d) 710.....	24
Dunne Inv. Co. v. Empire State Surety Co., 27 Cal. App. 208....	19
Finne v. Maryland Casualty Co., 173 Pac. 501.....	18
Foley v. United States Fidelity & Casualty Co., et al., 113 F. (2d) 888	30
Fruit Growers Supply Co. v. Goss, 4 Cal. App. (2d) 651.....	24
Globe Indemnity Co. v. Unity Ry Co., 272 Fed. 607.....	23
Guarantee Ins. Co. v. Ind. Acc. Comm., et al., 22 Cal. (2d) 516....	29
Hoppin v. Munsey, 185 Cal. 678.....	15
Indemnity Ins. Co. v. Watson, 128 Cal. App. 10.....	33, 34
Johnson v. Landucci, 21 Cal. (2d) 63.....	15
Johnson v. Morris, 210 Cal. 580.....	38
Lasky v. American Indemnity Co., 102 Cal. App. 192.....	35
McPherson v. Milling Co., 48 Cal. App. 491.....	38
Medico-Dental etc. Co. v. Horton & Converse, 21 Cal. (2d) 411	24
National Surety Co. v. Long, 125 Fed. 887.....	15
New England Equitable Ins. Co. v. Chicago Bonding & Surety Co., 36 Cal. App. 584.....	17
Pacific Automotive Device Co. v. U. S. F. & G. Co., 15 F. (2d) 164	41

iv.

	PAGE
Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co., 214 Cal. 384.....	7, 10
Pacific States Electric Co. v. U. S. F. & G. Co., 109 Cal. App. 691, 282 Pac. 812.....	9
People v. Doble, 203 Cal. 510.....	37
Perry v. Magneson, 207 Cal. 617.....	24, 33
Rathbun v. Payne, 21 Cal. (2d) 49.....	29
Roberts v. Security Trust & Savings Bank, 196 Cal. 557.....	8
Russell v. Ross, 157 Cal. 174.....	17
Ryan v. Shannahan, 209 Cal. 98.....	41
Seaboard Surety Co. v. Standard Accident & Ins. Co., 277 N. Y. 429, 117 A. L. R. 658.....	12
Sherman v. American Surety Co., 178 Cal. 286.....	25
Siegel v. Hechler, 181 Cal. 187.....	11
Stewart & Nuss, Inc. v. Ind. Acc. Commission, 55 Cal. App. (2d) 501	29
Stuyvesant Ins. Co. v. Sussex Fire Ins. Co., 90 F. (2d) 281....	40
Union Indemnity Co. v. Lang, et al., 71 F. (2d) 901.....	15
Union Oil Co. v. Mercantile Refining Co., 8 Cal. App. 768.....	24
Wilson v. Alcatraz Asphalt Co., 142 Cal. 182.....	38

STATUTE

United States Code, Annotated, Title 28, Sec. 695.....	38
--	----

No. 11658

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,

Appellant,

vs.

BASICH BROTHERS CONSTRUCTION COMPANY, a corporation,
tion,

Appellee.

APPELLEE'S BRIEF.

Statement of Jurisdiction.

The appellant's jurisdictional statement sets forth substantially the pleadings and facts upon which are based the jurisdiction of the District Court in this case and of this Court on appeal.

Statement of Facts.

This action was brought by appellee to recover from the appellant, as surety, damages sustained by appellee as a result of a breach of the obligations of the faithful performance bond guaranteeing the faithful performance of a subcontract for the furnishing of materials and performance of work at the Davis-Monthan Airfield at Tucson, Arizona.

On January 25, 1945, United States of America, through the Engineering Department thereof, as owner, entered into a contract with appellee, as general contractor, for the furnishing of materials and performing of work for the construction of taxiways, warmup and parking aprons, airfield lighting, drainage facilities and water service lines, together with appurtenant facilities necessary at said Davis-Monthan Airfield.

Under date of February 7, 1945, appellee, as general contractor, and Duque & Frazzini, a co-partnership, as subcontractors, entered into a subcontract whereby the subcontractors agreed to perform certain of the work and furnish certain of the material required of said appellee under its said contract with the United States of America. [This subcontract is set out at Tr. pp. 17 to 31, incl.]

By the terms of said subcontract, said subcontractors agreed to furnish 100%, labor, material and performance bond. [Article XXII of Subcontract, Tr. p. 28.] In compliance with said requirement, the subcontractors, as principal, and appellant, as surety, made, executed and delivered to appellee a faithful performance bond in the penal sum of \$101,745.55 for the faithful performance of the work contracted to be performed under the terms of said subcontract. [The bond is set out at Tr. pp. 32 to 36, incl.]

It is provided by the terms of said subcontract that the subcontractors shall furnish all materials, supplies and equipment, except as otherwise therein provided, and perform all labor required for the completion of said work

in accordance with the provisions of the original contract and of the specifications and plans referred to therein and under the direction and to the satisfaction of the principal's engineer or other authorized representative of said work. [Article I of the Subcontract, Tr. p. 18.]

It is further provided by the terms of the subcontract that the subcontractors shall, at their own expense, provide workmen's compensation insurance and insurance against liability for injury to persons or property and, if the subcontractors failed to do so, the general contractor is authorized to provide the same and to deduct the amounts of premiums payable therefor from moneys due the subcontractors. [Article VI, Tr. p. 20.]

It is further provided in said subcontract that the subcontractors shall promptly make payment to all persons supplying them with labor, materials and supplies and any such payments not made by the subcontractors when due may be made by the general contractor and the amounts thereof deducted from any moneys due the subcontractors. [Article XI, Tr. p. 21.]

It is further provided in said subcontract that the subcontractors are to submit weekly payrolls by Monday night of each week for the previous week which closes on Saturday at midnight to the general contractor and the general contractor to pay labor, compensation, insurance, public liability, property damage, Arizona employment insurance, Federal Old Age, Excise Tax on Employers and any other insurance on labor and charge same to the subcontractors, which amounts are to be deducted from the amounts earned. [Article XXI, Subsection 3, Tr. p. 25.]

It is provided in said bond furnished by appellant, as surety, after referring to said subcontract of date February 7, 1945, that the condition of the obligation of said bond is such that if the principal "shall faithfully perform the work contracted to be performed under said contract, and shall pay or cause to be paid in full the claims of all persons performing labor upon or furnishing materials to be used in or furnishing appliances, teams or power contributing to such work, then this obligation shall be void; otherwise to remain in full force and effect." [Tr. p. 32.]

The subcontractors commenced erecting one of their plants about February 11, 1945 [Tr. p. 770], and started operating their first plant between the 20th and 25th of February, 1945. [Tr. p. 572.] Appellee, under said subcontract with the subcontractors, reserved the right to compel the subcontractors to move in another plant if they failed to prosecute the work with sufficient equipment. [Article XII, Tr. p. 21.]

On April 5, 1945, pursuant to said Article XII of the subcontract, appellee notified the subcontractors in writing, a copy thereof being sent to appellant, that the subcontractors move in additional equipments to insure proper completion of their contract. [Plaintiff's Exhibit No. 4, Tr. p. 463.]

The subcontractors, having failed to comply with said notification of April 5, 1945, appellee again, on April 27, 1945, notified them and appellant, as their surety, of the failure on the part of the subcontractors to comply with

the requirements of said subcontract. [Plaintiff's Exhibit No. 5, Tr. p. 404.]

The subcontractors and appellant were again notified on May 23, 1945, that said subcontractors were failing to prosecute the work as required in the subcontract. [Plaintiff's Exhibit No. 8, Tr. p. 471.]

The subcontractors and appellant were further notified on June 1, 1945, and again on June 8, 1945, of the failure of the subcontractors to comply with the requirement of the subcontract. [Plaintiff's Exhibits Nos. 10 and 12, Tr. pp. 477 and 482, respectively.]

The evidence shows and the Court so found that the subcontractors abandoned the work on June 8, 1945. [Finding XIX, Tr. p. 203.]

On June 9, 1945, appellee made written demand on the subcontractor to proceed with said work and forwarded a copy thereof to appellant. [Plaintiff's Exhibit No. 13, Tr. p. 491.]

On June 11, 1945, appellee notified appellant that it, as surety, take such action as it may deem proper and until it did so, appellee, upon demand of the War Department, will proceed with the work for appellant's benefit and will comply with all reasonable instructions from it. [Plaintiff's Exhibit No. 14, Tr. p. 494.]

Having failed to receive a reply to its said communication of date June 11, 1945, appellee again communicated with appellant on June 14, 1945, stating that unless it is notified of other plans appellant had to complete said sub-

contract, appellee will assume it is the desire of appellant that appellee complete the same for appellant as the insurer of the subcontract. [Plaintiff's Exhibit No. 16, Tr. p. 500.]

On June 23, 1945, appellee received a letter from John E. McCall, attorney for appellant, merely informing appellee, in effect, that if appellee had failed to perform any of the conditions precedent required in the bond, without stating that appellee had in fact so failed, it can have no valid claim against the surety. [Plaintiff's Exhibit No. 17, Tr. p. 502.]

On June 29, 1945, appellee's attorney, answering said letter of Mr. McCall, advised him that appellee is merely striving to minimize the loss or damage to appellant and its assured and, at the same time, complete a vital defense project as required by the Federal Government. [Plaintiff's Exhibit No. 18, Tr. p. 504.]

Thereafter, appellee continued producing the material required under said subcontract and completed the same October 25, 1945. [Tr. p. 616.]

This action was commenced by appellee to recover from appellant (1) amounts paid out for labor, equipment and supplies for the account and benefit of the subcontractors in connection with the prosecution of said work by them up to the abandonment thereof on June 8, 1945, and (2) the reasonable cost of completing the work covered by the subcontract after its abandonment on June 8, 1945, by the subcontractors.

Judgment was rendered in favor of appellee, from which judgment the appellant surety has appealed.

ARGUMENT.

I.

Answer to Appellant's Contentions, First, That the Complaint Fails to State a Claim Upon Which Relief Can Be Granted (Opening Brief, p. 25); **and Secondly, That Appellee Made Premature Payments.** (Opening Brief, pp. 37, 38 and 56.)

Each of the above contentions involves the same question as to whether or not appellee failed to comply with a condition precedent contained in the bond in making alleged premature payments or overpayments in excess of 90% of the engineer's estimate as specified in the subcontract.

In support thereof, appellant cites the case of *Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co.*, 214 Cal. 384.

It is appellee's contention that the above cited case does not apply to the case at bar for the following reasons:

First: In the above cited case, the overpayment was made direct to the subcontractor while in the case at bar no payments were made direct to the subcontractors but were made direct to third parties furnishing labor, supplies or material or charged against the subcontractors on account of rental of equipment or supplies furnished by appellee to the subcontractors, all of which were used in the prosecution of said subcontract. [Tr. p. 322.]

Second: All payments made by appellee were within the term of the subcontract itself as found by the trial court [Finding No. VI, Tr. p. 190], which was not the situation in the above cited case.

Article VI of the subcontract required the subcontractors, at their own expense, to provide workmen's compensation insurance, insurance against liability for injury to persons or property and if they failed to do so, appellee was authorized by the subcontract to do so and charge same against subcontractors. [Tr. p. 20.]

Article XI of the subcontract required the subcontractors to promptly pay all persons supplying them with labor, materials and supplies and if they failed to do so appellee was authorized to do so and charge same against the subcontractors. [Tr. p. 21.]

Section 3, Article XXI of the subcontract required the subcontractors to submit weekly payrolls to appellee and appellee to pay labor, compensation insurance, public liability, property damage, Arizona employment insurance Federal Old Age, Excise Tax on Employers and other insurance on labor and charge same to the subcontractors. [Tr. p. 25.]

It is appellee's contention that the government contract, which is made a part of the subcontract [Article I, Tr. p. 18], the subcontract and the faithful performance bond executed by appellant, as surety, are to be considered as one instrument and constitute the contract between appellee, the subcontractors and appellant. The trial court made an express finding to this effect. [Finding V, Tr. p. 196.]

In *Roberts v. Security Trust and Savings Bank*, 196 Cal. 557, at page 566, the court said:

"A bond may incorporate, by reference expressly made thereto, other contracts, in which case the bond and the contract should be read together and construed fairly and reasonably as a whole according to

the intention of the parties. (*Callan v. Empire State Surety Co.*, 20 Cal. App. 483, 486 (129 Pac. 978, 979); *Smith v. Molleson*, *supra*.) Therefore, in interpreting the language of the undertaking for the purpose of gathering its scope, or the measure of the liability of the sureties, we must do so by treating or viewing the contract and the undertaking as constituting an indivisible contract.”

In *Pacific States Electric Co. v. U. S. F. & G. Co.*, 109 Cal. App. 691 (282 Pac. 812), at page 693, the court said:

“It is also elementary that a bond given to guarantee the execution of a contract according to its terms becomes a part of such contract, and to that contract the sureties become parties the same as though they had actually made and executed the contract itself.”

Appellant, itself, recognized that any overpayment for labor, materials or supplies were within the provisions of the subcontract. On May 24, 1945, appellee notified the subcontractors and appellant that it had, pursuant to Article XI of the subcontract, made labor payments, material payments and supply payments for the subcontractors but the amount of money earned by the subcontractors was not sufficient to meet the past advancements and demanded that they meet all present and future labor claims. [Plaintiff's Exhibit 9, Tr. pp. 474 to 476, incl.]

In reply thereto, appellant, through John E. McCall, its attorney, on June 7, 1945, stated:

“Your letter of May 24th, 1945, refers to Article XI of the Contract which provides that the subcontractors will pay for all labor and material, but you overlooked Section 22 of Article XXI of the Con-

tract which expressly provides that your client will pay, among other things, the weekly payrolls for labor." [Plaintiff's Exhibit 11, Tr. pp. 479, 480, 481.]

In *Pacific Coast Engineering Co. v. Detroit F. & S. Co.*, *supra*, on page 396, the court said:

"We discover nothing to the contrary in the cases of *Siegel v. Hechler*, 181 Cal. 187 (183 Pac. 664), and *Burr v. Gardella*, 53 Cal. App. 377 (200 Pac. 493), as in those cases the facts show that the payments were made within the terms of the contract."

In *Burr v. Gardella*, 53 Cal. App. 377, at page 387, the court said:

"Therefore, where, as we think the uncontradicted testimony of the plaintiff shows to be so in this case, the payments made were according to the requirement of the contract as to when certain payments should be made and were within the terms of the contract, and would consequently have to be made at some time, either by Keith or plaintiff or, to the extent of their liability, by the sureties, we do not think the payments so made are in fact premature within the fair and reasonable contemplation of the statute and the contract. In other words since the contract expressly provides that claims of the creditors must be paid when due and payable, it cannot be held that, if such payments are required to be made prior to the expiration of the thirty-five days after the completion of the contract and it becomes necessary for the contractor to pay them and it is impossible, from the extent of such obligations, to retain the twenty-five percent provided by the contract, the payment of them under such circumstances is such a violation of the terms

of the contract as to affect or change or impair the rights of the sureties, either in whole or in part. (*Bateman Brothers v. Mapel*, 145 Cal. 241, 243 (78 Pac. 734); *Hand Mfg. Co. v. Marks*, 36 Or. 523, (52 Pac. 512, 53 Pac. 1072, 59 Pac. 540); *Siegel v. Hechler, et al.*, 181 Cal. 187 (183 Pac. 664), *supra*).)"

In *Siegel v. Hechler*, 181 Cal. 187, at page 191, the court said:

"It was also a violation of the terms of the bond whereby the surety undertook that Hechler should perform the covenants of the subcontract and save Siegel harmless against loss by reason of any demands or claims which might be made against him or the owner for labor or material upon the subcontract work and against loss which he might be put to by reason of liens filed or stop notices given to the owner. Hechler having failed, the only way by which Siegel could save himself harmless from such failure and free himself from the liability thus imposed was by paying the bills at once. . . . If he had not been able to pay these bills at the time and additional damage to him had followed therefrom, the surety would have had so much more to pay on the bond."

In the case of *Basich Brothers Construction Company, et al., v. United States of America, for the use of Turner, et al.*, No. 11353, decided by this court on December 26, 1946, involving the identical subcontract, this court held that appellee herein was liable, under the Miller Act, for labor, material and supplies furnished the subcontractors.

In *Seaboard Surety Co. v. Standard Accident & Ins. Co.*, 277 N. Y. 429 (117 A. L. R. 658 at page 661), the court said:

"We have, then, a contract which obligated the subcontractor to provide materials. The general contractor is obligated by law to pay such materialmen if the subcontractor fails to make payments. The surety of the subcontractor agrees to indemnify the general contractor for all losses suffered by reason of the breach of the contract by the subcontractor. The subcontractor breaches his contract and fails to pay the materialmen. There can be no doubt that it has suffered a loss by reason of the subcontractor's breach which entitles it to indemnification by the surety of the subcontractor."

Reasonable charges made by appellee against the subcontractors as rental of its own equipment or supplies furnished the subcontractors are proper claims against appellant, as the surety of the subcontractors. For, as stated by the Supreme Court in the case of *Burr v. Gardella, supra*, at page 396, in denying a petition for rehearing:

"We think it proper to say, in addition to what is said by the District Court in its discussion of the point last mentioned in its decision, that the compensation which Burr is entitled to recover of the sureties for the use of the truck in question is limited to the reasonable value of its use during the time Keith was actually using it in the performance of the subcontract. . . ."

II.

A. Answer to Appellant's Contention That Appellee Failed to Comply With the Condition Precedent of the Bond by First Failing to Notify Appellant That the Work Was Not Commenced by February 19, 1945, and, Secondly, That the Subcontractors Did Not Erect Two Plants Each to Produce 800 Cubic Yards Per Day. (Opening Brief, p. 27.)

Appellant's main reliance in support of the above contentions is a letter dated April 5, 1945, from appellee to the subcontractors, a copy of which was sent to appellant. [Tr. pp. 463 and 464.]

That letter was sent for the sole purpose of enforcing a right reserved by appellee in the subcontract to compel the subcontractors to move in additional equipment as necessary to insure the completion of the work. [Article XII, Tr. pp. 21 and 22.]

The subcontract, itself, does not specify what character of work is required to be commenced by February 19, 1945. [Article II, Tr. p. 19.]

The evidence shows and the trial court found that "the subcontractors did commence operation about February 11, 1945, in connection with the installation of their plant necessary for the production of material" [Finding XXIX, Tr. p. 208], and the evidence shows that they started producing roughly February 25, 1945. [Tr. p. 771.]

The subcontract provides that "Duque & Frazzini to erect two plants, each to produce 800 cubic yards of suitable material to be used in connection with the contract." [Article XXI, Sec. 5, Tr. p. 25.] It does not specify when the two plants are to be erected and within what period of time each is to produce 800 cubic yards of ma-

terial. Appellee was not in need of additional material as the subcontractors were producing all it could use until it had to have material for concrete during the first part of April, 1945. [Tr. pp. 589, 590, 591.]

Based on substantial evidence, the trial court found, "that after commencing work under said subcontract and, on or about April 5, 1945, said Duque & Frazzini failed to have or thereafter to maintain sufficient workmen and/or sufficient equipment as in said subcontract required of them." [Finding IX, Tr. p. 197.]

Furthermore, as appellee was required to give notice of any alleged default within twenty days after learning of same, there is no evidence when it actually acquired knowledge of the aforesaid alleged defaults.

Appellee knew, from its records, when it first moved material, but the first material produced was stockpiled before it was removed by appellee. [Tr. p. 847.] It is true George Kovick, appellee's representative, was at the pit practically every day, but appellee, at the time, had two plants of its own operating at the same general locality which required his presence, and no inference can be drawn therefrom when he first learned of the alleged defaults on the part of the subcontractors. [Tr. pp. 771 and 772, 577 and 579, 627 and 628.]

The trial court, therefore, was justified in finding that appellee, upon acquiring knowledge of any and all failures of the subcontractors to comply with any of the provisions of the subcontract, properly complied with all conditions precedent of the bond and gave notice thereof to appellant in the manner and within the time provided in the bonds. [Finding XII, Tr. pp. 199 to 200.]

In *Johnson v. Landucci*, 21 Cal. (2d) 63, 69, the court said:

“Where the construction given an instrument by the trial court appears to be consistent with the true intent of the parties as shown by the evidence, another interpretation will not be substituted on appeal although such other interpretation might, without consideration of evidence, seem equally tenable.”

In *Hoppin v. Munsey*, 185 Cal. 678, 684, the court said:

“The question of what is a reasonable time depends in each case upon its own peculiar circumstances. It is primarily a question of fact for determination of the trial court.”

As no time was specified in the subcontract when the two plants referred to in appellant's brief were to be erected, it is to be presumed that they were to be erected within a reasonable time as may be determined by the trial court depending on the circumstances of the particular case.

Appellant cites the cases of *National Surety Co. v. Long*, 125 Fed. 887, and *Union Indemnity Company v. Lang, et al.*, 71 Fed. (2d) 901, in support of its position. Neither of these cases is applicable to the case at bar. In the one case in which the surety was to be immediately notified of any default, the subcontractor was to complete the construction of a building by September 1, 1901, which he failed to do and, although the owner had actual knowledge of this failure, he did not notify the surety until September 12, 1901. In the *Lang* case the subcontractor was required to weld not less than three-quarters of a mile per working day. Although the obligee on the bond knew that the subcontractor was not meeting the above

requirements, it did not notify the surety until some five weeks later.

In the case at bar, work started on the installation of the plant at least eight days prior to February 19, 1945. Production commenced between February 19 and February 25, 1945. [Tr. p. 597.] There is no evidence that appellee was aware, during this short period of six days, that material was not actually being produced or whether they acquired this information at a later date. And, if at a later date, there is no definite evidence as to when other than on or about April 5, 1945.

Conditions precedent are not favored by law and are to be strictly construed against one seeking to avail himself of them. See *Antonelle v. Lumber Co.*, 140 Cal. 309 at page 315 (73 Pac. 966).

B. Answer to Appellant's Contention That Appellee Failed to Comply With the Condition Precedent of the Bond in That It Had the Right Within 30 Days After Notice of Abandonment of the Work by the Subcontractor to Proceed or Procure Others to Proceed With the Performance of the Contract.

Appellee contends that there is no merit to the above contention for the following reasons:

First: The project involved was an emergency war project. The subcontract agreement provided that the provisions of the original contract with the government was, by reference, made a part of said subcontract and the work was to be performed under the direction and to the satisfaction of the government engineer. [Article I, Tr. p. 18.] The bond executed by appellee specifically refers to said subcontract, stating that a copy of said subcon-

tract "is or may be hereto annexed." [Tr. p. 32.] All parties, including appellant, were therefore bound to follow the directions of the government engineer who insisted that there be no suspension of work.

Second: Above condition precedent is applicable to default and not abandonment.

In *Russell v. Ross*, 157 Cal. 174, at page 181, the court said:

"It was the duty of plaintiffs to make the loss as light as possible. (*Winans v. Sierra Lumber Co.*, 66 Cal. 65 (4 Pac. 952).) Upon failure of Ross to complete the contract and the refusal of the surety company to have anything to do with the matter, it was clearly the right of plaintiffs to do the work themselves. (1 *Sutherland on Damages*, Sec. 91; *Bryant v. Bondwell*, 140 Cal. 490 (74 Pac. 33).)"

In *New England Equitable Insurance Co. v. Chicago Bonding & Surety Co.*, 36 Cal. App. 584, at page 585, the court said:

"But two points are presented on this appeal. The contract provided that in the event that MacDonald should delay the work Carr might prosecute it 'if the same is not done after three days' notice.' It is claimed that Carr did not give this notice before proceeding with the work after MacDonald's abandonment, and that the surety was thereby relieved from liability. As was expressly held by this court in *Bacigalupi v. Phoenix Bldg. etc. Co.*, 14 Cal. App. 632, 639 (112 Pac. 892), notice is unnecessary where the contractor *entirely abandons the contract*, which the trial court expressly found to be the fact in the case at bar." [See Finding XIX, Tr. p. 203, and Finding XXVI, pp. 206, 207.]

Third: Appellee had a right to proceed after abandonment, in order to minimize the damage.

In *California Cotton etc. Assn. v. Byrne*, 58 Cal. App. (2d) 340, at page 345, the court said:

"The rule is well settled that it is the duty of one who knows he is threatened with damage to do all he reasonably can do to minimize his damage. (*Vita-graph Theatres Co.*, 197 Cal. 694, 697 (242 P. 709); Civ. Code, Sec. 3354.)"

To same effect:

Alaska Salmon Co. v. Standard Box Co., 158 Cal. 567, 572;

Ash v. Soo Sing Lung, 177 Cal. 356, 362.

In the case of *Finne v. Maryland Casualty Co.*, 173 Pac. 501 (Wash.), the situation was somewhat similar to the case at bar, the conditions precedent being almost identical and the contentions raised by the surety company were practically the same. On page 503 of the above citation, the Supreme Court of the State of Washington said:

"But appellant also contends that, without any waiver on the part of the company, the respondents assumed control and completed the work after Hagart's default, thereby violating a condition precedent and defeating recovery. All discussion of this latter point is manifestly out of the way because, as already seen, the judgment reflects no burden or liability on account of respondent's completing the job. This provision of the bond only reserves to the surety the option to complete the work, exercise of which, or the lack of it, could in no sense, under the issues of the case, modify or change the rights and obligations of the parties as they existed at the time of the default. No prejudice is shown."

In answer to another contention that 15% of the amount was not withheld as required in the contract, the Washington State Supreme Court, in the same cited case, on page 503 stated:

“It is plain that 15 percent of the contract price has not been squandered; but more than that amount, indeed more than the contract price with extras added, has been used to pay creditors every dollar of which diminished the bonding company’s liability by just that much.”

C. Answer to Contention of Appellant That Appellee Violated a Condition Precedent.

First: By changing maximum size of rock. (Opening Brief, p. 37.)

This alleged change was not made by appellee but by the government’s resident engineer granted upon request of the subcontractors. [Defendant’s Exhibit A, Tr. p. 876.]

Second: By changing method of measurement.

This change was made at the request of the subcontractors to save the expense of extra men and, at the same time, it allowed them a greater measurement of material. [Tr. pp. 429, 430 and 431.]

As stated by the court in the case of *Dunne Inv. Co. v. Empire State Surety Co.*, 27 Cal. App. 208, at page 219:

“Hence, the surety company cannot put forth a substantial claim that it was injured or its rights impaired, and, therefore, cannot complain. (*Bateman Bros. v. Mapel*, 145 Cal. 241, 243 (78 Pac. 734).)”

III.

Answer to Appellant's Contention That It Did Not Waive nor Is It Estopped From Asserting Its Right to Plead Any Alleged Failure on the Part of Appellee to Comply With Any of the Conditions Precedent of the Bond. (Opening Brief, p. 40.)

First: Waiver and estoppel applicable to appellant's contention that appellee failed to give appellant notice as to (a) when subcontractors commenced work or (b) the amount of production, or (c) alleged premature payments or (d) other affirmative defenses.

On April 5, 1945, appellant had notice that the subcontractors did not commence work on February 19, 1945, nor had averaged 800 cubic yards of material per plant per day. [Plaintiff's Exhibit 4, Tr. pp. 463-464.] John H. Bray, appellant's Los Angeles Office Manager, thereupon received instruction from its San Francisco office to contact N. L. Basich, representative of appellee, and, in compliance therewith, he contacted Mr. Basich April 17 or 18, 1945, and asked Mr. Basich what the situation was. Mr. Basich then told Mr. Bray that he thought the subcontractors did not have the proper engineering set-up and organization. [Tr. pp. 696 to 699, incl.]

Mr. Bray then arranged with Mr. Basich to meet him in Tucson, Arizona, and left Los Angeles April 21, 1945, remaining in Tucson three or four days. [Tr. pp. 701 to 703, incl.]

When in Tucson, Mr. Bray inquired of the subcontractors when they commenced operation, examined their records, including payrolls, bills outstanding, discussed contents of said letter of April 5, 1945, and sought informa-

tion as to what the production was and costs thereof. [Tr. pp. 704 to 709, 798 to 799.]

He also received from appellee records of (1) payrolls, (2) truck measurements and (3) equipment rentals in reference to the subcontract. [Tr. pp. 679, 680, 713 and 714.]

On May 3, 1945, Mr. Bray, Mr. McCall, attorney for appellant, Mr. Basich and Mr. Monteleone, attorney for appellee, had a conference at which time Mr. Bray was advised that the subcontractors were not producing the required material. [Tr. pp. 721 and 722.]

Mr. Bray again, on May 10, 1945, made a trip to Tucson with a Mr. Bellou, an engineer selected by appellant to check the subcontractor's equipment. [Tr. pp. 722 and 823.]

At that time, while in Tucson, he was given information by the subcontractors of the subcontractors' payroll, rental of equipment and amount earned. [Tr. pp. 726, 803, 804 and 805.]

He then went to appellee's office and was given by it records of expenditures and earnings as applicable to the subcontract. [Tr. p. 726.]

He made another trip to Tucson on behalf of appellant and remained there May 28, 29 and 30, 1945. He was then given statements of the subcontractors' payroll, rental of equipment, bills payable and amount of material produced and was then told that the expenditures far exceeded the amount earned. [Tr. pp. 732, 733 and 734.]

Mr. Bray, in turn, sent his report to appellant's San Francisco office. [Tr. p. 713.]

In addition to the above investigation made by Mr. Bray, appellee notified appellant of the true situation on

the part of the subcontractors from April 5, 1945, up to the date of the abandonment of the work by the subcontractors on June 8, 1945. [Plaintiff's Exhibit No. 5, letter dated April 27, 1945, Tr. pp. 464 to 467, incl.; Plaintiff's Exhibit No. 7, letter dated May 15, 1945, Tr. pp. 469 to 470, incl.; Plaintiff's Exhibit No. 8, letter dated May 23, 1945, Tr. pp. 471 to 473, incl.; Plaintiff's Exhibit No. 9, letter dated May 24, 1945, Tr. pp. 474 to 476, incl.; Plaintiff's Exhibit No. 10, letter dated June 1, 1945, Tr. pp. 477 to 479, incl.; Plaintiff's Exhibit No. 12, letter dated June 8, 1945, Tr. pp. 482 to 486, incl.]

The only replies received from appellant during this period of time were two letters from J. E. McCall, appellant's attorney, mailed to appellee's attorney, one dated May 8, 1945, in which he stated, among other things, the following:

"I was advised by Mr. Bray this morning that he called Duque & Frazzini and was told they are now turning out the required quantity of material and if necessary they will operate another shift."

Further on in the same letter he stated:

"If any friction arises between the contractor regarding the work in question, I shall be glad to work with you in an effort to secure complete co-operation between them." [Tr. pp. 467 to 469, incl.]

In the other letter received from Mr. McCall, dated June 7, 1945, he stated, among other things, the following:

"The subcontractors deny that they are in default in any way whatever."

Further, in the same letter, he stated:

"I am therefore unable to understand why your client wishes to put in additional equipment to take

care of extra work when our information received from the subcontractors and from your client is in effect that there has been no shortage of aggregates to date.” [Tr. pp. 279 to 281, incl.]

Second: Waiver and estoppel applicable to any alleged right on the part of appellant to complete or procure others to complete the work after its abandonment on June 8, 1945. Appellant was notified on April 27, 1945, more than thirty days before the work was abandoned, that unless it or the subcontractors install additional equipment, appellee would do so in order to minimize the damages. [Tr. pp. 464 to 467, incl.]

Again it was requested to do something on June 1, 1945 [Tr. pp. 477 to 479]; June 8, 1945 [Tr. pp. 482 to 486]; June 11, 1945 [Tr. pp. 494, 495, 497 to 499]; June 14, 1945 [Tr. pp. 500 to 502], and June 29, 1945. [Tr. pp. 504 to 507, incl.] Yet, during all of that period of time, appellant never indicated that it desired to do anything itself in connection with the completion of this vital war project. [Tr. p. 740.]

The trial court found that there was a waiver and estoppel in favor of appellee and against appellant. [Findings XXXIII and XXXIV, Tr. pp. 210 and 211.]

In *Globe Indemnity Co. v. Unity Ry. Co.*, 272 Fed. 607, 610, the court said:

“If he (representative of Indemnity Co.) had no authority to act for his company, his presence and participation in the conversations and conferences to further the performance of the contract is inexplicable. That he had authority to represent his company was his sole ground for taking part in the conversations and conferences.”

The same conclusion must be reached as far as the authority of Mr. Bray is concerned in representing appellant.

In *Medico-Dental etc. Co. v. Horton & Converse*, 21 Cal. (2d) 411, 432, the court said:

“Waiver may be shown by conduct; and it may be the result of an act which, according to its natural import, is so inconsistent with the intent to enforce the right in question as to induce a reasonable belief that such right has been relinquished. (67 C. J., par. 7, pages 304-307.)”

In *Christie v. Commercial Casualty Co.*, 6 Cal. App. (2d) 710, 719, the court said:

“It is the established rule of law that when a surety on a bond claims that he is released from the obligation thereon because of an alteration of the instrument or on account of changed relationship of the claimant for wages, the surety must disavow his liability promptly or within a reasonable time after learning of the alteration or the surety will be bound by the bond in spite of the changed instrument or altered condition.”

To same effect see

Union Oil Co. v. Mercantile Refining Co., 8 Cal. App. 768, 772;

Perry v. Magneson, 207 Cal. 617, 621;

Fruit Growers Supply Co. v. Goss, 4 Cal. App. (2d) 651, 655.

There never was any disavowal by appellant of its obligation on its bond after it had been repeatedly informed

of the alleged acts of default on the part of the subcontractors. [Tr. p. 743.]

Appellee, therefore, contends that not only does the evidence sustain the trial court's findings on the issues of waiver and estoppel favorable to appellee [Findings XXXIII and XXXIV, Tr. pp. 210 and 211], but also the learned trial judge correctly stated the law as follows:

"An attitude like this is like the 'indulgence' extended to one after a complaint of fraud is made and which results in delay of rescission. He who induces such indulgence is not in a position to complain of it. (*Noll v. Baida*, 1927, 202 C. 105, 198; *Hunt v. L. M. Field Inc.*, 1927, 202 C. 701, 702.)" [Tr. p. 192.]

IV.

Answer to Appellant's Contention That Appellee Concealed From Appellant the Fact That Duque & Frazzini Were in Default at Time Bond Was Accepted.

The rule has been stated in *Sherman v. American Surety Co.*, 178 Cal. 286, 290, that:

"The principle to be deduced from these and other like decisions is that in so construing the bond no hardship is imposed upon a surety, since in entering into the contract it is deemed chargeable with notice, not only of the financial ability and integrity of the contractor, but with notice as to whether he possesses the plant, equipment, and tools required in doing the particular work or will be compelled to rent and hire the same or some part thereof, all of which matters are factors to be considered in determining the risk and upon which the surety fixes the premium exacted for executing the bond."

Not only did the trial court find against the above contention of appellant [Finding XXIX, Tr. p. 208] but its own representative, Mr. Bray, testified that his investigation disclosed that no facts were concealed. [Tr. pp. 750, 751.]

Although the bond was dated February 20, 1945, the subcontractors had made definite arrangement for the bond prior to February 7, 1945. [Tr. pp. 759, 760 and 761.]

Whatever payments were made by appellee for the account of the subcontractors from and after February 11, 1945, until the date the bond was executed on February 20, 1945, was on account of labor and were made within the terms of the subcontract.

All of the alleged matters which appellant now contends were concealed by appellee were fully disclosed to it during the progress of the work and, at no time, did appellant intimate that any facts, as now contended on appeal, were concealed. The first time this particular question was raised by appellant was in its answer in which the same was set up as an affirmative defense. For that reason, if for no other reason, it is not only estopped from asserting such contention, but, if it did have a right based on such contention, it most distinctly waived the same by its conduct.

V.

Answer to Appellant's Contention That Subcontract Was Altered by Appellee Without Its Knowledge or Consent. (Opening Brief, p. 49.)

1. Appellee at no time supervised or interfered with the subcontractors' work as contended by appellant at page 49 of its brief. As already indicated hereinabove, appellee had its own operations at the general locality distinct from that of the subcontractors in connection with the production of material. [Tr. pp. 771 and 772, 632.] That portion of the testimony of George W. Kovick quoted by appellant on page 49 of its brief referred to production of material produced by appellee's own plant at the pit, distinct from the operations of the subcontractors.

2. The fact that all employees of Duque & Frazzini were carried on appellee's payroll, or labor, supply or equipment bills were paid by checks of appellee or the fact that appellee named itself as employer in all returns and reports, as contended by appellant at page 49 of its brief, were in accordance with the terms of the subcontract as found by the trial court.

3. George W. Kovick, appellee's general superintendent, did not countermand any orders of Carson Frazzini on or about May 19, 1945, as stated on page 50 of appellant's brief. The incident therein referred to applied to the occasion when the subcontractors were prospecting for new material and were stopped by Mr. Golob, the owner of the property, and not Mr. Kovick, when they wanted to go behind his barn and house to get the material. [Tr. pp. 810 to 817, incl.; 820 to 822, incl.; 411 to 413, incl.]

4. Appellant further complains, at page 50 of its brief, that certain repairs were made to equipment on the subcontract work over the protests of Duque & Frazzini. There is a conflict of evidence whether there was any protests made by the subcontractors. Furthermore, these repairs were made on the rows of crusher of the Pioneer Plant rented by the subcontractors from appellee and they were necessary and the charges reasonable. [Tr. p. 419.]

5. The Government, and not appellee, as contended at page 50 of appellant's brief, dictated the site where material was to be taken and the selection was within the terms of the contract. [Tr. p. 409; Subcontract, Article XXI, Subsection 1, Tr. p. 25.]

6. The Government and union, not appellee, as contended on page 50 of appellant's brief, set the rate of wages of subcontractors' employees. George W. Kovick, in connection therewith, testified as follows:

"A. It was set by the unions and also in the general specifications covering the work." [Tr. p. 617.]

7. Appellee rented equipments at the request, on behalf of, and as an accommodation to, the subcontractors without any profit to itself, the rate of rental being based on the O. P. A. rate and reasonable. [Tr. pp. 664, 665, 670, 671.]

There is no basis for any of the complaints by appellant in regard to the above for, whatever was done by appellee in connection therewith, was within the terms of the subcontract.

8. The P. D. O. C. crusher, referred to at page 50 of appellant's brief, was installed about June 1, 1945, more than 30 days after appellee notified appellant of the failure

of the subcontractors to install proper equipment as required of them by the terms of the subcontract. The installation of this crusher by appellee was made after the failure of the subcontractors or appellant to comply with the demands of appellee and in order to minimize damages and the charges were reasonable. [Plaintiff's Exhibit No. 5, Tr. pp. 464 to 467, incl.]

Appellant cited the case of *Stewart & Nuss, Inc., v. Industrial Accident Commission*, 55 Cal. App. (2d) 501, in support of the above contentions on its part. (Brief, p. 51.)

If it had quoted the entire paragraph in the case of *Stewart & Nuss, Inc., v. Industrial Accident Commission*, *supra*, instead of a part thereof, it is appellee's contention that what was said by the court supports appellee's rather than appellant's position. The court, in that case, clearly indicated that if the payments were advanced by the contractor to the subcontractor to meet the subcontractors' payroll and the employees were carried on the contractor's payroll in accordance with the terms of the contract, the same would be permissible and would, in no manner, impair the obligations of the surety on its bond.

In *Burlingham v. Gray*, 22 Cal. (2d) 87, quoting from *Rathburn v. Payne*, 21 Cal. (2d) 49, the court held, on page 103, "that an 'employee' on the blanket insurance policy does not fix his status as such."

In *Guarantee Ins. Co. v. Industrial Accident Commission, et al.*, 22 Cal. (2d) 516, the court, at page 520, held that "carrying payroll or mere payment of wages is not sufficient to establish relation of employer and employee."

The other contentions of appellant under Paragraph V of its opening brief, commencing on page 49, have already been answered in this brief.

VI.

Answer to Appellant's Contention That Appellee Made Premature Payments. (Opening Brief, p. 56.)

The contentions of appellant under Paragraph VI of its brief that appellee had made premature payments have already been hereinabove answered in answer to Paragraph I of appellant's brief.

VII.

Answer to Appellant's Contention That Appellee Made an Election on or Prior to June 8, 1945, to Complete the Subcontract Work, Instead of Giving Notice to Appellant as Required in the Bond and According It the Right to Proceed or Procure Others to Proceed With the Performance of the Subcontract. (Opening Brief, p. 61.)

Appellant's contention above stated has been already answered. The work was abandoned by the subcontractors on June 8, 1945. This contention of appellant has not only been answered hereinabove, but also it has been clearly and logically answered by the learned trial judge in paragraphs III and IV of the Decision and Order for Judgment and Findings. [Tr. pp. 187 and 188.]

In *United States for use of Foley v. United States Fidelity & Guaranty Co., et al.*, 113 F. (2d) 888, an almost similar situation was presented to the court. It was there stated by the court on page 890:

"The appellee's argument suggests that regardless of Fiumara's liability to Warren Corporation, under

the Miller Act bond, Fiumara can have no recovery upon his counterclaim and third party complaint because of his failure to obtain the architect's certificate required by Article V of the subcontract as a condition precedent to Fiumara's privilege of doing the work himself and deducting the cost thereof from money due or to become due to Foley. This condition cannot prevail. Foley repeatedly refused to do the disputed work claiming it was not within the contract; he knew Fiumara was undertaking to do it himself and at no time did he suggest that Fiumara had no authority to provide the necessary labor and materials until he had obtained a certificate from the architect. Having repudiated his own obligation and having acquiesced in Fiumara's performing the work, Foley must be held to have waived the architect's certificate as a condition precedent."

So may it be said of appellant in the case at bar. Having been advised that the subcontractors abandoned their work on June 8, 1945, having been further advised that the Government was insisting on the prosecution of this vital defense project while at war, and having been further advised that appellee would proceed with the work in order to minimize the damages, appellant, by its failure to indicate that it intended to proceed with the work, must be presumed to have acquiesced in appellee proceeding, and accordingly to have waived any right to do the abandoned work itself, as surety for the subcontractors.

VIII.

Appellee Is Entitled to Recover Interest.

Appellant, while the subcontractors were operating before they abandoned the subcontract on June 8, 1945, were given all information of the amount of charges made against the subcontractors by appellee for labor, supplies and rental of equipment employed in connection with the performance of the subcontract work. These amounts were definite, fixed and reasonable. All of the records in connection therewith in appellee's possession or the subcontractors' possession were checked by its representative. [Tr. pp. 438, 439, 793, 794, 804, 827, 679, 680.] These charges were necessary, reasonable and actually applied in the performance of the subcontract. Had appellant desired a complete account at the date of the abandonment of the work by the subcontractors it was available. Although appellant filed with the court what purports to be a memorandum in reference to plaintiff's Bill of Particulars [Tr. pp. 146 to 186, incl.], it utterly failed to offer a scintilla of evidence to question the payments or reasonableness of any of the items in appellee's Bill of Particulars as amended or corrected.

The same situation applies in reference to the expenditures incurred by appellee in the completion of the work after its abandonment. The evidence shows and the trial court found that these expenditures were actually incurred and were reasonable and necessary to complete the subcontract. [Findings XVI, XVII, XIX, Tr. pp. 201, 202, 203, 204, 205.]

On June 14, 1945, appellee, after the abandonment of the subcontract, notified appellant as follows:

"Unless we hear from you upon receipt hereof of other plans you have to complete this contract, we

will assume it is your desire that we complete the same for you as the insurer of the subcontractors. All of our records of costs and other matters connected therewith are at your disposal and we will furnish you with whatever information you may request.” [Plaintiff’s Exhibit No. 16, Tr. pp. 500, 501, 502.]

Again, on June 29, 1945, appellee’s attorney wrote to appellant’s attorney as follows:

“Whatever data you or your client may request, including items of expenditure, will be furnished you upon request and the records of my client are open for your inspection at any time.” [Tr. pp. 504 to 507, incl.]

During the trial, appellee produced in court eight boxes of records and, when made available to appellant, its counsel made the following statement in open court:

“May it please the court, to clarify the position of defendant, and possibly save more time, it is not our position that the payments alleged were not made. It is only our position that the defendant is not liable for the amounts paid for various reasons which we have shown or can show. We admit they made payments, but because they were premature and for other reasons the defendant is not liable.” [Tr. pp. 405, 406.]

Thereafter, defendant made no contention, during the trial, nor offered any evidence, that these expenditures were not reasonable or necessary. The trial court was not called upon, therefore, to determine any issue in reference to the actual payment or reasonableness or necessity of these expenditures and for that reason the cases of *Perry v. Magnesson*, 207 Cal. 617, and *Indemnity Ins. Co. of N. A. v. Watson*, 128 Cal. App. 10, 16, cited by appellant,

are not applicable. In those cited cases, not only was there an issue made at the trial as to the actual payment or reasonableness of the expenditures calling for a determination by the court, but the court found against the amount claimed by the plaintiffs.

The items of expenditures, as shown in plaintiff's Bill of Particulars, up to the date of the abandonment on June 8, 1945, in the case at bar, were then certain and determined and, on those items, which then became due under the subcontract and bond, appellee is entitled to interest from that date. The items in reference to the completion of the job after its abandonment, as shown in the Bill of Particulars, were certain and definite at its completion on October 25, 1945, and, for that reason, appellee is entitled to interest on those items from October 25, 1945. On June 8, 1945, appellee notified appellant and the subcontractors that, unless the subcontractors comply with their obligations within three days, appellee contemplated using all reasonable means to meet this requirement in order to minimize the damages and charge all expenses in that regard, including operating expenses, against them. [Plaintiff's Exhibit 12, Tr. pp. 482 to 486, incl.]

In *Indemnity Ins. Co. v. Watson*, 128 Cal. App. 10, 21, cited by appellant, the court said:

"The general rule with respect to the allowance of interest is that where there is no contract to pay interest, the law awards interest upon money from the time it becomes due and payable, if such time is certain and the sum is certain or can be made certain by calculation. (*Gray v. Bekins*, 186 Cal. 389, 399 (199 Pac. 767); *Perry v. Magneson*, 207 Cal. 617, 623 (279 Pac. 650); 14 Cal. Jur., p. 678.)"

In *Lasky v. American Indemnity Co.*, 102 Cal. App. 192, at page 198, the court said:

“Defendant, for the first time in its supplemental brief, filed after oral argument, urges, upon the authority of *Perry v. Magneson*, 207 Cal. 617 (279 Pac. 650), that the judgment is erroneous in allowing interest from the date of the filing of the complaint. The cited case holds that in an action by an owner to recover the cost of completion of building abandoned by the contractors, from the surety on a bond to save such owner harmless from loss resulting from a breach of the building contract, interest from the commencement of the action should not be allowed, where the evidence is conflicting as to such cost and the amount thereof is uncertain, till determined by judgment. Since defendant has utterly failed to print in its brief any portion of the testimony showing that the cost of completion was disputed by it at the trial, we may assume as correct plaintiff’s assertion in their reply brief that no such dispute occurred and that the case was tried upon the theory that such cost was certain. (*Firpo v. Pacific Mut. Life Ins. Co.*, 80 Cal. App. 122 (251 Pac. 657).) If the parties treated such cost as certain, the court properly allowed interest from the date of filing the complaint.”

Appellant, after the work was abandoned by the subcontractors on June 8, 1945, forced appellee to use its own money to finance the completion of the work without profit or compensation for overhead. Therefore, appellee should be allowed interest on all moneys advanced by it for the benefit and with full knowledge on the part of appellant from the date the advancements were determined and made certain until that money is repaid.

IX.

Trial Court Did Not Err in Permitting George J. Popovich to Testify in Reference to Items in Bill of Particulars.

This witness was secretary and office manager of appellee, and has had experience as an accountant, having passed the certified public accountant's examination of the State of California. [Tr. p. 318.]

He arranged the system of keeping account of the expenses or moneys paid out in connection with the sub-contract work. [Tr. p. 321.]

Those records were kept in the ordinary course of business and the above system adopted by this witness was a system usually adopted by contractors in work of that kind. [Tr. p. 322.]

This witness was asked to state from what data schedule I, payroll of plaintiff's Bill of Particulars, was prepared. When this question was asked, the following took place:

"A. The items were prepared from weekly payrolls submitted by Duque & Frazzini.

Mr. McCall: That is objected to, as the payrolls themselves would be the best evidence." [Tr. p. 323.]

Then followed the proceedings set forth on page 70 of appellant's brief.

No motion was made to strike the above answer given by the witness before the above objection was made; no other objection, at any other time, was made to the testimony of this witness, nor at any time was his qualification questioned nor was any motion made to strike out his testimony in any other respect.

Although the data in the Bill of Particulars was compiled by Homer Thompson, the same under the supervision of Mr. Popovich. [Tr. p. 324.]

The payroll records of Duque & Frazzini were prepared under the direction of Carson Frazzini in the ordinary course of business. [Tr. p. 836.]

Appellee's records of the quantities of material removed, payroll and rental of equipment were kept in the ordinary course of business and correctly portrays the actual condition as it existed. [Tr. p. 670.]

Counsel for appellant, on page 74 of the opening brief, states:

“No books or records of any kind from which the Bill of Particulars was purportedly compiled, were offered by appellee in evidence or even for identification.”

During the trial the court suggested that all records be brought into court to make its ruling correct in permitting in evidence a summary of the records as set forth in the corrected Bill of Particulars. Accordingly, eight boxes of original records were brought into court and made available which appellant conceded showed that the payments were made. [Tr. pp. 404, 405, 406.]

The case of *People v. Doble*, 203 Cal. 510, 514, cited by appellant in its brief, holds that such summary is admissible so long as the records are available to the opposing party. For on page 514 of the above case the court said:

“We, of course, are not intending to hold that the books in each case must be actually received in evidence to warrant the introduction of such summary so long as they are available for use of the opposing party. . . .”

In addition thereto, appellant had Mr. Vernon, its auditor, check those records previously consuming several weeks, and, although he testified, he did not question a single item. [Tr. pp. 434 to 439, incl.]

In *Johnson v. Morris*, 210 Cal. 580, 587, the court held that a public accountant could give a summary of accounts prepared by him and an assistant under his supervision and control.

In *Wilson v. Alcatraz Asphalt Co.*, 142 Cal. 182, at page 189, the court held that it was not error to permit a witness to summarize the testimony as to oil purchased by defendants from other parties. The court there stated:

“The course pursued was the proper one. (Code Civ. Proc., sec. 1855, subd. 5; Greenleaf on Evidence, 16th ed., sec. 563h, and cases cited.) There was in fact no dispute as to the figures. . . .”

In *McPherson v. Milling Co.*, 44 Cal. App. 491, 495, the court said:

“There is no contention that the statement was not correct as a summary of what the books showed nor that they were not correct. The appellant had it in its power to show any error in either in the trial court.”

The entire Bill of Particulars, as amended and corrected, filed by appellee, was taken from records kept in the ordinary course of business and comes within the provision of Section 695 of Title 28, United States Code, Annotated.

Appellant not only admitted that the payments were made [Tr. p. 405] but also had an expert check all of the records. [Tr. pp. 438 and 439.]

The only objection made by appellant to the testimony of witness George P. Popovich, as hereinabove indicated, was that the "Payrolls themselves would be the best evidence." [Tr. p. 323.]

On page 70 of its opening brief, appellant's counsel charges that there was a misrepresentation to the court that the original records were in court. This statement is unwarranted. Original records were in court at the particular time although not all of them. The following proceedings then took place while the witness was on the witness stand:

"Q. Will you submit to the court tomorrow morning when you return the names of the employees on the first page of Schedule XXX? A. Yes, sir, we will bring all our records here.

Mr. Monteleone: Mr. McCall, there are four boxes of them. We will be willing to bring the four boxes of daily payroll records.

Mr. McCall: Of course, we are not asking you to do such a job as that. . . ." [Tr. p. 397.]

"Mr. Monteleone: Mr. McCall, do you want us to bring in the payroll records tomorrow?

Mr. McCall: I am not stating to the plaintiff what records to show.

The Court: I think to be safe, in order to make any ruling correct, you should bring in everything that you have." [Tr. p. 404.]

After eight boxes of original records were brought in court, Mr. McCall stated in open court that "it is not our position that the payments alleged here were not made." [Tr. p. 405.]

In response to the above admission by appellant's counsel, the court said:

"Had you admitted they were made and merely questioned the validity we would have saved a day yesterday." [Tr. p. 406.]

In *Stuyvesant Ins. Co. v. Sussex Fire Ins. Co.*, 90 F. (2d) 281, at page 283, the court said:

"We do not feel that these exceptions are important as the facts which it was intended thereby to prove, so far as relevant, have been stated or admitted by counsel in the record, and all the parties appear to be agreed as to what the facts are by statements in their brief."

As the evidence shows, without contradiction, that all of the records involved were correctly made in the ordinary course of business, any attempt to question a summary made therefrom, after the originals were made available to appellant, is, we contend, without merit.

Homer Thompson, who actually kept the books of appellee in the field, was in court to testify but in view of the admission by appellant's counsel that it was not his position that the payments alleged in the bill of particulars were not made, he was not called to the witness stand. [Tr. pp. 433, 434.]

X.

**Answer to Appellant's Contention That Surety's
Obligation Measured Only by the Terms of the
Bond.**

In support of the above contention, appellant cites the case of *Pacific Automotive Device Co. v. U. S. F. & G. Co.*, 15 F. (2d) 164, 165. Appellee has no quarrel with the law as therein stated but does contend that the facts therein are radically different than the case at bar. A more analogous situation is found in the case of *Ryan v. Shannahan*, 209 Cal. 98, at page 103, where the court said:

“Furthermore, as above stated, a copy of the contract was attached to the bond and it is impossible to properly construe the language of the undertaking other than in the light of the contract, the faithful performance of which is secured.”

Conclusion.

We submit that the only action appellant has taken in connection with the project involved was to accept the premium, send a representative to investigate the numerous complaints made by appellee and, after threatened with a lawsuit, raise highly technical defenses.

We submit appellee did everything that a reasonably prudent person would do under the circumstances. The attitude and conduct on the part of the appellant surety throughout this whole matter was aptly described by the learned trial judge “like the ‘indulgence’ extended to one

after a complaint of fraud is made and which results in a delay of rescission.”

Appellee respectfully submits that the judgment of the trial court should be affirmed.

Respectfully submitted,

STEPHEN MONTELEONE,

TRACY J. PRIEST,

Attorneys for Appellee.

No. 11658

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,

Appellant,

vs.

BASICH BROTHERS CONSTRUCTION COMPANY, a corporation,

Appellee.

APPELLANT'S REPLY BRIEF.

JOHN E. McCALL,

926 Rowan Building, Los Angeles 13,

Attorney for Appellant.

ROBERT E. FORD,

JOSEPH J. BURRIS,

Of Counsel.

FILED

OCT 30 1947

PAUL P. O'BRIEN,

CLERK

TOPICAL INDEX

	PAGE
Answer to Point I of appellee's argument.....	1
Answer to Point II of appellee's argument.....	5
Answer to Point III of appellee's argument.....	10
Answer to Point IV of appellee's argument.....	10
Answer to Point V of appellee's argument.....	12
Answer to Point VII of appellee's argument.....	13
Answer to Point VIII of appellee's argument.....	13
Answer to Point IX of appellee's argument.....	13
Answer to Point X of appellee's argument.....	15
Conclusion	15

TABLE OF AUTHORITIES CITED

CASES	PAGE
Burr v. Gardella, 53 Cal. App. 377, 200 Pac. 493.....	2
Finne v. Maryland Casualty Co., 173 Pac. 501.....	9
Maryland Casualty Co. v. Shafer et al., 57 Cal. App. 580, 208 Pac. 192	4
McMannus v. Temple Estate Co., 10 Cal. App. (2d) 419, 51 P. (2d) 1124.....	10
National Surety Co. v. Long, 125 Fed. 887.....	8
Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co., 214 Cal. 384, 6 P. (2d) 888.....	2
Pacific States Electric Co. v. U. S. F. & G. Co., 109 Cal. App. 691, 293 Pac. 812.....	3
Roberts v. Security Trust and Savings Bank, 196 Cal. 575, 238 Pac. 673	3
Sherman v. American Surety Co., 178 Cal. 286, 173 Pac. 161....	11
Siegel v. Hechler, 181 Cal. 187, 183 Pac. 664.....	2, 3
Union Indemnity Company v. Lang, et al., 71 F. (2d) 901.....	8

CYCLOPEDIA

7 Cyclopedia of Federal Procedure (2d Ed.), p. 543.....	14
---	----

No. 11658

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,
Appellant,

vs.

BASICH BROTHERS CONSTRUCTION COMPANY, a corporation,
Appellee.

APPELLANT'S REPLY BRIEF.

Appellee's brief fails to meet the issues presented upon this appeal, and contains many misleading statements and inferences not supported by the record.

Answer to Point I of Appellee's Argument.

Appellee does not question appellant's contention that if premature payments are shown on the face of the complaint, appellee has failed to state a claim upon which relief can be granted. Appellee merely argues:

1. That the payments made by appellee were not premature because they were made, not to the subcontractor but direct to the furnishers of labor and material for the account of the subcontractor.

Appellant contends that if a payment is premature when made to a subcontractor, it is premature when made to others for the account of the subcontractor, and appellee has cited no authority to the contrary.

2. That all payments made by appellee "were within the terms of the subcontract."

The subcontract contains no provision for payment by appellee in excess of 90% of engineers estimates and 90% of useable materials in stockpile. [Tr. p. 23.] This provision of the subcontract is definite and controlling as to the amount which appellee could pay to or for the subcontractor during the progress of the job. Under the terms of the bond, appellee was required, as a condition precedent to any liability of the surety, to retain the last payment payable and all reserves and deferred payments retainable by the obligee under the terms of the subcontract. [Tr. p. 34.]

At pages 10 and 11 of its brief, appellee urges the court to apply to this case the holding in the cases of *Burr v. Gardella*, 53 Cal. App. 377, 200 Pac. 493 and *Siegel v. Hechler*, 181 Cal. 187, 183 Pac. 664, instead of the holding in the case of *Pacific Coast Engineering Co. v. Detroit Fidelity & Surety Co.*, 214 Cal. 384, 6 P. (2d) 888, cited by appellant.

In the case of *Burr v. Gardella*, the court did not lay down the rule that premature payments could be made. The court held that because the contract, which was a public contract, specifically provided for the immediate payment of claims for labor and material, that when read together with the other conditions of the bond which provided only for payment of such claims by the contractor if they were not paid,—that authorized the making of

payments, and the court said that the payments were not premature because the obligation to pay immediately was just as binding as the other obligation.

That case was decided in 1921, and the Supreme Court of California in *Siegel v. Hechler* specifically held that even where the owner is compelled, in order to avoid liens, to pay money to laborers and materialmen, he cannot recover to the extent of the premature payments.

Appellee states at page 8 of its brief that Articles VI and XI of the subcontract provided it could make certain payments "and charge same against the subcontractors." This is not true. The Articles in question merely authorized appellee to "deduct" certain payments from amounts "due the subcontractor."

Also on page 8 of its brief, appellee contends that the contract, the subcontract and the bond "are to be considered as one instrument and constitute the contract between appellee, the subcontractors and appellant." In support of this contention, appellee quotes from the cases of *Roberts v. Security Trust and Savings Bank*, 196 Cal. 575, 238 Pac. 673 and *Pacific States Electric Co. v. U. S. F. & G. Co.*, 109 Cal. App. 691, 293 Pac. 812 (erroneously cited by appellee as 282 Pac.).

In the *Roberts v. Security Trust and Savings Bank* case, the bond specifically provided that it guaranteed the performance of the contract, together with any modifications which might thereafter be made, and in the *Pacific States Electric Co. v. U. S. F. & G. Co.* case, the bond guaranteed the labor and material claims. In the case at bar, the bond contains express conditions precedent, each of which must be performed before the obligee can have any valid claim whatsoever under the terms of the subcontract.

plant was to produce 800 cubic yards of material, and that it is to be presumed that they were to be erected within a reasonable time depending on the circumstances of the case.

Appellee at all times interpreted the subcontract to provide that each plant was to produce 800 cubic yards of suitable material per day. [Tr. pp. 7, 463, 472-473.] The subcontract itself provided that "time is of the essence of this agreement." [Tr. p. 31.] Nick L. Basich testified that the second plant did not start operating until between the 25th of March and the 1st of April. [Tr. p. 573.] This was more than five weeks after production of material was to have been commenced.

At page 14 of its brief, appellee contends that there is no evidence as to when it actually acquired knowledge of the default of the subcontractors. As pointed out at page 28 of appellant's opening brief, George W. Kovick, general superintendent of appellee, testified that he was in the pit on February 11, 1945 and every day thereafter through February. Nick L. Basich testified that whenever he was on the job he "was every day in that pit." [Tr. p. 574.] Basich further testified that when he wrote the letter of April 5, 1945, he knew of his own knowledge that Duque & Frazzini did not commence the production of material on February 19, 1945. [Tr. pp. 596-597.] Furthermore, the testimony of both Kovick and Basich shows an entire familiarity with the movements of the subcontractors. Basich testified that Duque wasn't there the first time he was over there, but Frazzini was there all the time,—every time he was there Frazzini was there [Tr. pp. 574-575], and when asked whether both Duque and Frazzini were at the pit every day, Kovick answered

that Frazzini was there the largest part of the time in February, and Duque showed up on the job some time in March. [Tr. p. 621.]

Appellee further states on page 16 of its brief, that "Production commenced between February 19 and February 25, 1945," but contends that there is no evidence that appellee was aware during that time that material was not actually being produced, or whether it acquired the information at a later date. On this point we have the testimony of George W. Kovick, general superintendent for appellee, who testified:

"Q. Do you have your books with you, that most contractors prepare during the construction of a job?

A. No. I believe that is in the files of Basich Brothers Construction Company. We generally keep a job diary.

Q. What do you call the job diary—the 'black book?' A. No.

Q. What is it? A. In this case it was a little brown book, used for my convenience, more than anything else, showing the starting date of the project and the arrival of the various types of equipment on the project.

Q. Did you mark in there the date Duque & Frazzini completed construction of the first crusher plant, or the assembling of it? A. No. I marked down the first date they started producing material." [Tr. pp. 621-622.]

It is thus shown that appellee knew, through its general superintendent, the exact day the first material was produced. It is presumed that if the evidence as to the exact day the first material was produced had been favorable to appellee, it would have put it into the record.

conditions of the subcontract on its part to be performed, by stating that some of the alterations made in the contract without the consent of the surety, were requested by and were for the benefit of the subcontractors, and that therefore the surety not being injured thereby, cannot complain.

As said in the case of *McMannus v. Temple Estate Co.*, 10 Cal. App. (2d) 419, 51 P. (2d) 1124:

“It is settled, however, that the parties to an obligation cannot materially alter its definite terms without a guarantor’s consent even though such parties in good faith believe it is to the guarantor’s advantage to make the alteration. We are not required and under the law are not permitted to speculate whether the alteration benefits or injures the guarantor.”

Answer to Point III of Appellee’s Argument.

Appellee’s argument under Point III, commencing at page 20 of its brief, is fully answered by appellant in its opening brief, commencing at page 40.

Answer to Point IV of Appellee’s Argument.

Appellee’s statement at the top of page 26 of its brief that appellant’s “own representative, Mr. Bray, testified that his investigation disclosed that no facts were concealed” is a clear misrepresentation of the evidence. We quote from the record the testimony referred to by appellee to support this statement:

“Mr. Monteleone: Let us put it in plain words. The Glens Falls Indemnity Company, in its Proposed Amended Answer, accuses the Basich Brothers Con-

struction Company of concealing facts from the Glens Falls Indemnity Company. Have you, in your investigation, found any facts which were concealed from the Glens Falls Indemnity Company by the Basich Brothers Construction Company?"

This question was objected to by counsel for appellant and after some discussion the following occurred:

"Mr. McCall: Answer if you have any personal information on the subject.

A. I have no personal information.

Q. (By Mr. Monteleone:) And you acquired your information from your investigation, did you?

A. I did not.

Mr. McCall: I object to that as assuming something not in evidence.

Mr. Monteleone: He has answered it. He said he did not." [Tr. pp. 750-751.]

Appellant submits that the foregoing falls far short of supporting the statement of appellee.

The case cited by appellee on page 25 of its brief, *Sherman v. American Surety Co.*, 178 Cal. 286, 290, 173 P. 161, no bearing on the point here argued. No question of concealment from the surety was involved in that case.

On page 26 of its brief, appellee contends that appellant is estopped from asserting such concealment and has waived same. Appellee cannot now, for the first time in its brief on appeal, urge either waiver or estoppel in connection with this defense.

Answer to Point V of Appellee's Argument.

The contention made by appellant at page 49 of its opening brief is that the evidence shows that appellee had control of and did supervise and control the subcontract work.

At page 27 of appellee's brief this is flatly denied, and whereas appellant referred to the testimony of George W. Kovick, general superintendent [Tr. p. 627], showing that he did supervise the subcontract work, appellee has referred to pages 632, 771 and 772 of the Transcript, at which point the record merely gives a description of two plants constructed near the pit by appellee, one, a batch plant for combining concrete aggregate, and the other an asphalt plant. According to the testimony referred to by appellee, these plants were not even installed at the time referred to by Kovick when he said he was supervising work relative to the necessary production of material. [Tr. p. 772.]

Subparagraph 2 on page 27 of appellee's brief, infers that the subcontract authorized appellee to carry all the employees of Duque & Frazzini on its own payroll, pay the bills with appellee's checks, and name itself as the employer in all returns and reports, but does not refer to any evidence in support of this statement, and we submit that there is no provision in the subcontract in support thereof.

Subparagraph 3, on page 27 of appellee's brief flatly denies that George W. Kovick, its general superintendent, countermanded any order of Carson Frazzini on or about May 19, 1945 as stated at Paragraph 5 on page 50 of appellant's opening brief. That he did countermand appellant's orders was testified to by George W. Kovick [Tr. pp. 656-659] and Nick L. Basich [Tr. pp. 605-607].

In Subparagraph 6 on page 28 of appellee's brief, it denies that appellee set the rate of wages of subcontractor's employees. In answer to this we find the following testimony by George W. Kovick:

"Q. In connection with the employees on the sub-contract, do you know who set the wages for regular time and overtime? A. Me, and the unions." [Tr. p. 617.]

The foregoing fairly illustrate the misrepresentations to be found throughout appellee's brief

Answer to Point VII of Appellee's Argument.

Point VII of appellee's argument, beginning at page 30 of its brief fails to meet the issues raised in Point VII of appellant's opening brief beginning at page 61, on the subject of election and raises no point which is not fully answered by appellant's opening argument.

Answer to Point VIII of Appellee's Argument.

While appellee's brief beginning at page 32 contains statements not supported by the record, we do not believe that any point is raised on the question of interest which is not fully answered in appellant's opening brief beginning at page 64.

Answer to Point IX of Appellee's Argument.

Appellant's opening brief at page 69 states "All of the testimony of appellee's witness George J. Popovich was based on a false foundation." This statement appellee has not denied, but endeavors to excuse the misrepresentations which were made to the court that the records were in court and available to opposing counsel, by contending

that the evidence, though based on a false foundation, should stand, because appellant did not make a motion to strike, after the testimony, on cross-examination, was found to be false. It is the contention of appellant that after it made its objection and the witness was allowed to testify on the representation of appellee that the original records were in court, and after this representation was shown to be false it was not necessary to make any further objection or motion.

“An objection made and ruled on need not be repeated when similar evidence is thereafter offered (Citing *Salt Lake City v. Smith*, 104 Fed. 457, *Mine & Smelter Supply Co. v. Parke & Lacy Co.*, 107 Fed. 881), and it need not be renewed by a motion to strike (Citing *Grand Trunk Pac. R. Co. v. Tollard*, 286 Fed. 676).”

Cyclopedia of Federal Procedure, 2nd Edition, Vol. 7, p. 543.

After the representation of appellee that the original records were in court, was shown to be false, the court suggested to appellee that on the following day it bring in all of the records in connection with the case. [Tr. pp. 404-405.]

Appellee argues that because it brought into court eight boxes of records the following day, the testimony of Popovich should stand.

There is no evidence that anything in the eight boxes produced in court by appellee was admissible in evidence, nor that appellee had in court any person who could identify the contents.

Appellee states on page 37 of its brief that eight boxes of records were brought into court and made available

“which appellant conceded showed that the payments were made.” A reference to the record cited by appellee [Tr. pp. 404-406] will show that this was an entirely incorrect statement, and that appellant did not concede that the contents of the eight boxes showed anything. There is no evidence that the boxes were opened, or the contents exhibited to anyone.

Answer to Point X of Appellee's Argument.

The case cited by appellee in Point X is not at variance with the case cited by appellant at Point X, page 75 of its opening brief, which case is controlling on the point in question.

Conclusion.

For the reasons set out in appellant's opening brief, the judgment should be reversed.

Respectfully submitted,

JOHN E. McCALL,

Attorney for Appellant.

ROBERT E. FORD,

JOSEPH J. BURRIS,

Of Counsel.

1871

1872

1873

1874

1875

1876

1877

1878

1879

1880

1881

1882

1883

1884

1885

1886

1887

1888

1889

1890

1891

1892

1893

1894

1895

1896

1897

1898

1899

1900

1901

1902

1903

1904

1905

No. 11658

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,

Appellant,

vs.

BASICH BROTHERS CONSTRUCTION COMPANY, a corporation,

Appellee.

PETITION OF APPELLANT FOR REHEARING.

JOHN E. MCCALL,
926 Rowan Building, Los Angeles 13,
Attorney for Appellant.

FILED
1948



TABLE OF AUTHORITIES CITED

CASES	PAGE
Castner Curran & Bullett, Inc. v. Sudduth Coal Co., 282 Fed. 602	4
Cities Service Gas Co. v. Kelly Dempsey & Co., Inc., 111 F. (2d) 247	5
Coche, et al. v. Vacuum Oil Co., et al., 63 F. (2d) 406.....	4
Continental Oil Co. et al. v. Fisher Oil Co., 55 F. (2d) 14.....	5
Drainage Dist. No. 1 of Lincoln County, Neb., et al. v. Rurle, et al., 21 F. (2d) 257.....	5
E. I. Du Pont De Nemours & Co. v. Claiborne-Reno Co., 64 F. (2d) 224	4
Gulf Refining Co., et al. v. Home Indemnity Co. of New York, 78 F. (2d) 842.....	5
Hood, et al. v. Verdugo Lumber Co., 127 Cal. App. 133, 15 P. (2d) 542	16
Indemnity Ins. Co. of North America v. Watson, et al., 128 Cal. App. 10, 16 P. (2d) 760.....	16
Metropolitan Casualty Ins. Co. of New York v. Banks, 76 F. (2d) 68	3
Northern Pac. Ry. Co. v. Twohy Bros., 95 F. (2d) 220.....	2, 9
Queen Ins. Co. of America v. Meyer Milling Co., 43 F. (2d) 885	4
Southern Ry. Co. v. Coca-Cola Bottling Co., 145 F. (2d) 304....	4
Star Chronicle Pub. Co. v. New York Evening Post, Inc., et al., 256 Fed. 435.....	3
Taylor v. J. B. Hill Co., 31 A. C. 382.....	2
Union Indemnity Co. v. Lang, et al., 71 F. (2d) 901.....	6
United States v. McIntyre, 111 Fed. 590.....	12
Van Zandt v. Hanover National Bank, 149 Fed. 127.....	3

STATUTES

Civil Code, Sec. 1648.....	9
Civil Code, Sec. 1654.....	2



No. 11658

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GLENS FALLS INDEMNITY COMPANY, a corporation,
Appellant,

vs.

BASICH BROTHERS CONSTRUCTION COMPANY, a corporation,
Appellee.

PETITION OF APPELLANT FOR REHEARING.

*To the Honorable United States Circuit Court of Appeals
for the Ninth Circuit:*

Comes now your petitioner Glens Falls Indemnity Company, appellant-defendant, and respectfully petitions for rehearing in the above entitled case, in which the opinion was filed on the 3rd day of February, 1948, and as grounds for rehearing assigns the following:

I.

This Honorable Court has pointed out that certain ambiguities exist between Article XVI, Article XI and Article XXI, Subdivision 3, of the subcontract.

The Court has interpreted the subcontract in favor of the prime contractor apparently completely overlooking the fact, which is uncontradicted in the record, that the subcontract was drawn by an officer of appellee corpora-

tion. Such an interpretation ignores the universal rule recognized by the law of the State of California and all of the Circuits of the United States Circuit Court of Appeals, from which we have been able to obtain direct quotations, to the effect that any uncertainty or ambiguity in a contract shall be construed directly against the party drawing the contract, which party had the opportunity to use any of the words in the English language to express itself.

In support of this proposition we respectfully refer the Court to the case of *Northern Pac. Ry. Co. v. Twohy Bros. Co.* (Ninth Circuit), 95 F. (2d) 220, wherein the Honorable William Denman, writing the opinion, said:

“However, were the term ‘work’ still ambiguous as to its interpretation, we are required to interpret it against the railway, since it prepared the contract headed ‘Form 109-A General Contract’ which the contractor signed.”

Civil Code of California, Section 1654, provides:

“In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party; except in a contract between a public officer or body, as such, and a private party, in which it is presumed that all uncertainty was caused by the private party.”

In the case of *Taylor v. J. B. Hill Co.* (1948), 31 A. C. 382, the court said:

“It is a settled rule that in case of uncertainty in a contract it is construed most strongly against the party who caused the uncertainty to exist—the party drafting the instrument.”

If the decision of this Court is to be taken as adopting a rule contrary to the rule just expressed, your petitioner desires to point out that such a rule would be out of harmony with the following cases in the following circuits:

Second Circuit:

In the case of *Van Zandt v. Hanover National Bank*, 149 Fed. 127, the court in construing a contract which permitted of two interpretations, reversed the judgment of the District Court in favor of defendant who prepared the contract. The court said, in part:

“Such instruments are always to be construed most strictly against the party by whom they have been prepared.”

In the case of *Star Chronicle Pub. Co. v. New York Evening Post, Inc., et al.*, 256 Fed. 435, at 441, the court said:

“Where a contract is ambiguous, it will be construed most strongly against the party employing the words concerning which doubt arises. * * * The law holds a man responsible for ambiguities in his own expressions and he has no right to induce another to contract with him on the supposition that his words mean one thing, hoping that the Court may make them mean another thing.”

Third Circuit:

“The trial judge could properly have been influenced by the rule of construction that, if a provision in a written contract is of doubtful meaning, the doubt is to be resolved against the party which drafted the agreement.”

Metropolitan Casualty Ins. Co. of New York v. Banks, 76 F. (2d) 68.

Fourth Circuit:

“The contract was drawn by defendant, and ambiguities must be resolved against it.”

Castner Curran & Bullett, Inc. v. Sudduth Coal Co., 282 Fed. 602, at 603-604.

“The contract was drawn by Southern. It was signed, as so drawn, by Coca Cola without the change of a word. When the words of a contract are ambiguous, it is a well known and worthy maxim of our law that such ambiguities should be resolved against the party that drew the contract and selected its terminology and nomenclature.”

Southern Ry. Co. v. Coca Cola Bottling Co., 145 F. (2d) 304, at 307.

Fifth Circuit:

In the case of *Coche, et al. v. Vacuum Oil Co., et al.*, 63 F. (2d) 406, at 409, the court quotes with approval:

“* * * Where words or other manifestations of intention bear more than one reasonable meaning, an interpretation is preferred which operates more strongly against the party from whom they proceed.’ (Contract-restatement Sec. 236.)”

Eighth Circuit:

“The language of a contract will be construed most strongly against the party preparing it.”

E. I. Du Pont De Nemours & Co. v. Claiborne-Reno Co., 64 F. (2d) 224.

To the same effect:

Queen Ins. Co. of America v. Meyer Milling Co.,
43 F. (2d) 885.

"It must also be kept in mind that, when a written contract is entirely prepared by one of the parties, and accepted as thus prepared by the other, any doubt as to the meaning of its provisions is to be resolved against the party preparing it."

Drainage Dist. No. 1 of Lincoln County, Neb., et al. v. Rurle, et al., 21 F. (2d) 257, at 261.

To same effect:

Gulf Refining Co., et al. v. Home Indemnity Co. of New York, 78 F. (2d) 842, at 844.

Tenth Circuit:

"* * * and even if we assume the instrument to be ambiguous in this respect, the rule applies that the doubt be resolved against the party who drew it."

Continental Oil Co., et al. v. Fisher Oil Co., 55 F. (2d) 14, at 16.

"The conflict, if any there be, between the provisions of Article four and Article three was introduced into the contract by the changes suggested by the construction company. The language, therefore, under Sec. 9478, *supra*, must be interpreted most strongly against the construction company which caused the uncertainty to exist."

Cities Service Gas Co. v. Kelly Dempsey & Co., Inc., 111 F. (2d) 247, at 249.

II.

In its opinion, the Court said:

"We are convinced appellee was diligent in meeting the conditions required of it by the bond."

The Court in arriving at this conclusion takes the following steps which overlook uncontradicted evidence which

This holding of the Court overlooked the undisputed evidence that no material was produced until about February 25th, and the evidence contained in the letter of Nick L. Basich, president of appellee, dated April 5th, 1945, in which appellee referred to the subcontract dated February 7, 1945, and stated that:

“* * * to date you have not averaged 800 cubic yards of material per plant per day”

and further stated that the subcontractor did not start producing materials on the 19th of February, 1945.

The Court also overlooked the uncontradicted statement contained in the letter of appellee dated April 27, 1945, in which appellee stated that the subcontractor had produced less than 50% of the amount required by the subcontract.

Step No. 4. The Court said in its opinion:

“The contract does not specify the nature of the work that was to commence on February 19.”

The purpose of the contract was the production of material, and the parties understood that *commencement of work* and *production of material* meant one and the same thing.

The Court overlooked the letter which appellee addressed to the subcontractor April 5, 1945, which uses the terms “crushing material” and “commence work” as synonymous in the following words:

“Reference is made to our contract agreement, dated February 7, 1945, in which you agreed to commence crushing material with one plant on February 19, 1945 * * *

* * * your attention is directed to the fact that the plant did not commence work on February 19th;
* * *.”

The Court also overlooked the language of the subcontract which states that the general contract

“* * * includes the following described work to be done under this agreement:

Item 9 Gravel embankment, Item 11 Gravel for stabilized subgrade under gravel base course, Item 15 Gravel for base course, Item 21 Rock and sand for 18"-12"-18" Portland cement concrete airfield pavement, Item 22 Rock and sand for 10" Portland cement concrete airfield pavement, Item 26A Rock and sand for binder course asphaltic concrete, Class 1, Item 26B Rock and sand for wearing course asphaltic concrete, Class 2.”

The subcontract also states in Article II that:

“The work shall be commenced not later than February 19, 1945, * * *.”

California Civil Code, Section 1648, provides:

“*Contract restricted to its evident object.* However broad may be the terms of a contract, it extends only to those things concerning which it appears that the parties intended to contract.”

In the case of *Northern Pac. Railway Co. v. Twobly Bros. Co.*, 95 F. (2d) 220, this court said in part:

“However, were the term ‘work’ still ambiguous as to its interpretation, we are required to interpret it against the railway, since it prepared the contract headed ‘Form 109-A General Contract’ which the contractor signed.”

Step No. 5. In its opinion the Court said:

“The finding of the District Court that appellant had received sufficient and timely notice of the defaults of Duque and Frazzini finds ample support in the evidence.”

We believe the Court completely overlooked that there is no evidence whatever in the record to show that any notice was ever given as required by Paragraph First of the surety bond. The first intimation to appellant surety of any default on the part of the subcontractor was the letter of April 5, 1945, which appellee contended had only one purpose—that of forcing the subcontractor to install additional equipment.

Step No. 6. The Court overlooked the condition precedent set out in Paragraph Second of the bond, that the obligee must perform all of the terms, covenants and conditions of the subcontract on its part to be performed.

The uncontradicted evidence shows that obligee did not perform the provisions of Article XVI of the subcontract. Proof of appellee's failure to comply with this condition precedent is shown in plaintiff's complaint and in its bill of particulars, which show that plaintiff not only paid 90% according to Article XVI of the subcontract, but paid up to June 8, 1945, \$36,456.41 in excess of the gross earnings under the subcontract.

III.

In holding that the subcontract was not altered, except in changes in the specifications regarding the method of measuring material and in the size of rock, and that such changes were of small significance and in no way affected the risk of the surety, the Court has overlooked the law applicable to the rights of a surety when the contract has

been in any respect altered without its consent, and has overlooked undisputed evidence regarding the following material alterations of the contract:

1. The uncontradicted evidence shows that the general superintendent of appellee supervised work in the pit relative to the necessary production of material; that he countermanded orders of the subcontractor on May 19, and the subcontract employees continued work on his orders and against the orders of Frazzini; that Basich entered into a contract, without the consent of Duque and Frazzini, to move into the pit for subcontract work a machine at a cost of \$2500.00; that all employees were carried on the payroll of appellee as its own employees; that appellee set the wages for the subcontract employees in violation of the prime contract, which provides:

“The contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less or more than those stated in the specifications (subject to Executive Order No. 9250 and the General Orders and Regulations issued thereunder) regardless of any contractual relationship which may be alleged to exist between the contractor or subcontractor and such laborers and mechanics; * * *.”

2. In holding that appellee did not make premature payments to or for the subcontractor, the Court overlooked the requirement of the subcontract which was drawn by

appellee, particularly Article XVI thereof which provides that partial payments by appellee to the subcontractor

“* * * will be made by the Contractor on the basis of 90% of engineers estimate and 90% of useable materials in stockpile,”

and overlooked paragraph XVI of plaintiff's complaint which alleges that appellee not only paid all of the amounts earned by the subcontractor, but in addition thereto paid \$36,456.41 prior to June 8, and has overlooked the fact that these payments were made by reason of an alteration in the subcontract “following the execution” of the subcontract. [Tr. p. 128.]

3. In holding that the change in the method of measuring material and the method of paying therefor was of small significance, we think the Court overlooked the fact that the change in the subcontract which required that the material, Item 11, be measured on truck-water level to the measurement of square yards as shown in plaintiff's bill of particulars [Tr. p. 80], was a complete change in the method of measurement of material and the method of payment, the results of which are impossible to calculate, and which created an ambiguity and uncertainty in the contract which did not exist theretofore. The cost of performance may thereby have been materially increased, but due to the nature of the change such result is not possible to calculate.

In *United States v. McIntyre*, 111 Fed. 590, the court said in part:

“I think it fundamental that any change in the contract without his consent, will operate his discharge. The Surety assures the performance of a certain contract, and his liability is conditioned inflexibly upon

the continuance of that particular contract. As stated by a distinguished judge: 'He who would charge a Surety for his principal's breach of contractual duty must travel without deviation the way pointed out in the contract, however ironbound it may be; for there is for the Surety in the enforcement of his bond, no equity nor latitude beyond its strict terms.' "

IV.

It is apparent that the Court has overlooked consideration of, or has misapprehended the following undisputed evidence which makes the testimony of appellee's witness George J. Popovich wholly inadmissible:

After Popovich was sworn as a witness the following occurred:

"Q. Referring to your bill of particulars, Mr. Popovich, which was introduced in evidence, Schedule I, Payroll—Duque & Frazzini, from February 11, 1945 to June 9, 1945, showing a total of \$38,979.65, subject to the corrections made this morning, will you state from what data or information that item was prepared? A. The items were prepared from weekly payrolls submitted by Duque & Frazzini.

Mr. McCall: That is objected to, as the payrolls themselves would be the best evidence.

The Court: In the Federal Court, if the payrolls are available, a person who had charge of them can summarize.

Mr. Monteleone: We have the originals; if Mr. McCall desires the originals, they are in court.

The Court: So long as the originals are available for inspection, it is not necessary to produce them.

Mr. Monteleone: They have been inspected by the auditor for the defendant on many occasions.

The Court: I will allow you then to refer to this as a summary, it being understood that the originals are present and available to counsel. That is the Federal rule, and has been for many years."

On cross-examination witness Popovich testified:

"Q. I believe you said, in connection with Schedule I, that the information which you used to make up that schedule was taken from payroll sheets which you have in court? A. Yes.

Q. Do you have those before you? A. Yes, we do.

Q. How many payroll sheets do you have making up Schedule I? A. We have all payroll sheets from the beginning of the job, January 29th to October 13, 1945."

After many evasive answers, the witness finally admitted he did not have any of the payroll sheets in court.

"The Court: Counsel wants to know if you have any weekly sheet.

Mr. Monteleone: No, I don't think we have."

It is thus seen that the condition on which the court allowed the witness to testify was not complied with, but appellee falsely stated it had the records in court.

Witness Vernon who checked the records for appellant testified that there was no line of demarcation whatsoever between checks which were alleged to have been paid for the account of the subcontractor and checks for work and material on the prime contract, and that the name of Duque and Frazzini did not appear on any invoice or check exhibited to him covering items charged to Duque and Frazzini, which testimony was not denied.

We submit that appellant was prejudiced by being denied proof on which appellee's claim was based.

V.

In holding that the amount of damages claimed by appellee was definite and fixed and at all times available to appellant, the Court has overlooked the following undisputed evidence, and that the claim was based upon reasonable value. The effect is to materially prejudice appellant by charging it with interest prior to judgment contrary to accepted legal concepts regarding recovery of interest.

1. Appellee's complaint alleged reasonable value, and at the trial appellee endeavored to prove by witness Popovich the reasonable value of each and every schedule in the bill of particulars;

2. Appellant received no information regarding amounts until after the suit was filed when it demanded a bill of particulars;

3. The verified complaint demands one amount, the verified bill of particulars shows another amount, and on the date of the trial appellee admitted that it had wrongly charged items amounting to hundreds of dollars which it requested be deducted; that after deducting all these amounts the judgment, without interest, was in an amount greater than prayed for in the complaint; the Court further overlooked the fact that plaintiff's bill of particulars contained an item of \$611.09 for public liability and property damage insurance which is alleged to be for the subcontractor. Appellee refused to allow appellant to examine the policy until several demands were made and the Court ordered appellee to produce the pol-

icy, and when the policy was produced appellee admitted that it did not cover the subcontractor.

4. In holding that,

“* * * the reasonableness of the charges incurred had never been disputed.”

the Court overlooked the undisputed record at pages 125 to 128 of the transcript which shows that many items were in dispute and errors admitted by appellee.

In the case of *Hood, et al. v. Verdugo Lumber Co.*, 127 Cal. App. 133, 15 P. (2d) 542, the court said:

“Appellants contend that interest should not have been allowed on the amounts found due to the defendant lumber companies, as in their cross-complaint they sought the reasonable value of the building materials furnished. In findings X and XIV the court determines the reasonable value of the building materials furnished to be \$1,852.39 as to the Verdugo Lumber Company and \$3,938.39 as to Emil F. Swanson, doing business under the fictitious firm name and style of Eagle Rock Lumber Company. In view of these findings we feel interest could not be allowed prior to the rendition of judgment.”

In the case of *Indemnity Ins. Co. of North America v. Watson, et al.*, 128 Cal. App. 10, 16 P. (2d) 760, the court said:

“Having in mind the theory upon which the case was tried and the fact that with respect to certain items contained in the schedule of charges appearing in the complaint, the amounts of such items were in dispute, and the proof produced at the trial showed such amounts as alleged to be in excess of the amounts

properly due, we have arrived at the conclusion that the court was justified in refusing to advise the jury that it might make an allowance for interest."

Wherefore, appellant prays for a rehearing and for reversal of the cause.

Respectfully submitted,

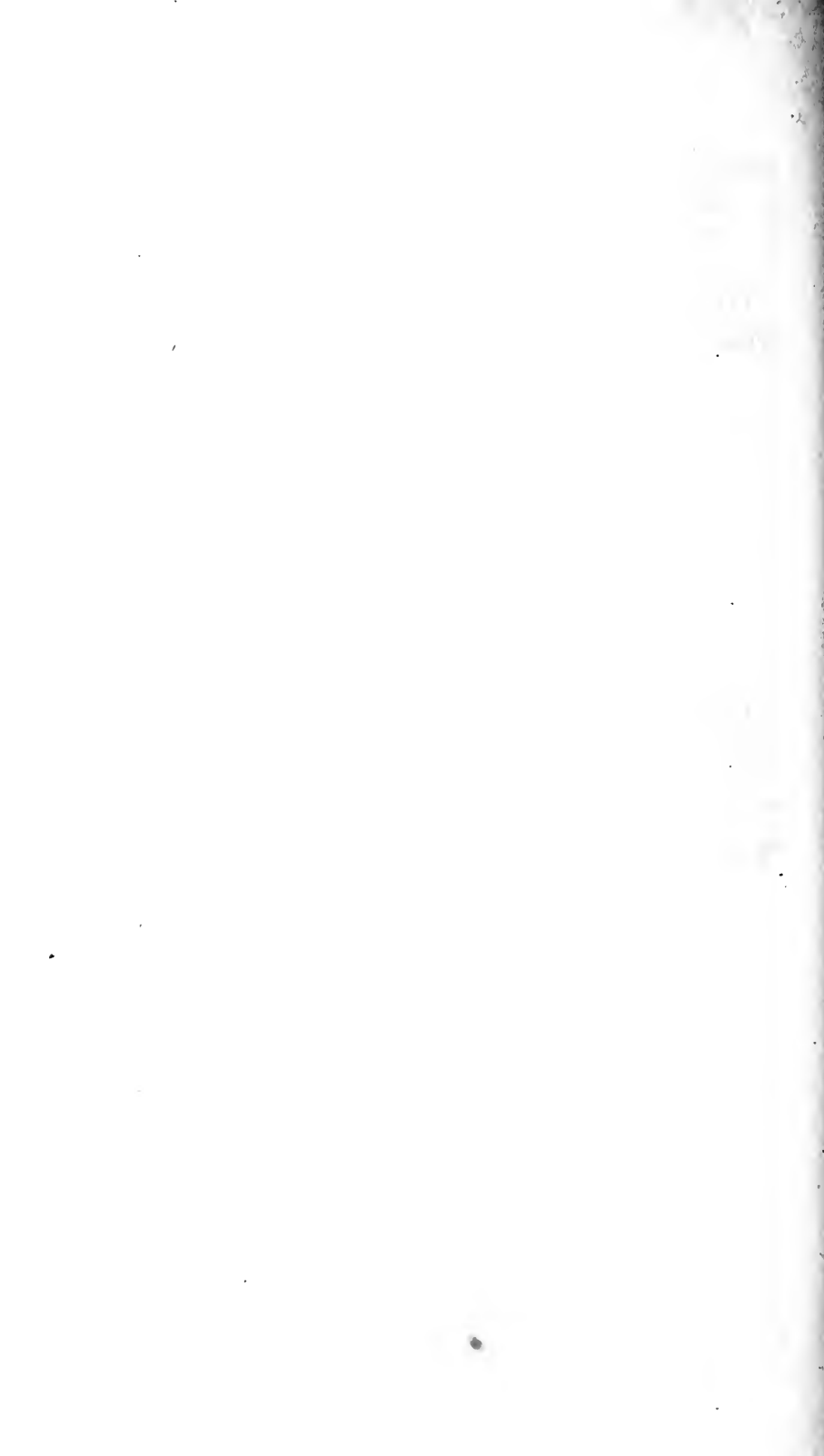
JOHN E. McCALL,

Attorney for Petitioner.

Certificate of Counsel.

I, the undersigned, John E. McCall, attorney for petitioner herein, hereby certify that in my judgment and opinion the foregoing petition for a rehearing is well founded, and that it is not interposed for purpose of delay.

JOHN E. McCALL.



No. 11,659

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

DORSEY McMAHAN,

Appellant,

vs.

JAMES A. JOHNSTON, Warden, United
States Penitentiary, Alcatraz Island,
California,

Appellee.

BRIEF FOR APPELLEE.

FRANK J. HENNESSY,

United States Attorney,

JOSEPH KARESH,

Assistant United States Attorney,

Post Office Building, San Francisco,

Attorneys for Appellee.



Subject Index

	Page
Jurisdictional statement	1
Statement of the case	2
Question	3
Contention of appellee	3
Argument	3
Conclusion	9

Table of Authorities Cited

Cases	Page
Coffin v. Reichard (CCA-6), 143 F. (2d) 443.....	6
Estabrook v. King (CCA-8), 110 F. (2d) 607.....	7
Ex parte Smith, 64 S.W. 1052 (Tex.)	6
Ex parte Terrill, 287 P. 753 (Okla.)	5
In re Berman (CCA-7), 80 F. (2d) 361, certiorari denied 298 U.S. 660	5
In re Ellis, 91 P. 81 (Kan.)	5
In re Pinaire, N.D. Tex. 46 F. Supp. 113.....	7
In re Stewart, N.D. Cal. S.D. 1 F.R.D. 105.....	4
Koehler v. Nicholson (CCA-4), 117 F. (2d) 344.....	5
Moore v. Aderhold (CCA-10), 108 F. (2d) 729.....	7
Ponzi v. Fessenden, 258 U.S. 254	5
Sarshik v. Sanford (CCA-5), 142 F. (2d) 676.....	5
Stroud v. Johnston, 139 F. (2d) 171.....	5
Youngblood v. United States, 141 F. (2d) 912, 914.....	4
Zerbst v. Kidwell (CCA-5), 92 F. (2d) 756, reversed on other grounds, 304 U.S. 359	5

Statutes

Rules of Civil Procedure for District Courts, Rule 81(b), 28 U.S.C.A. following Section 723(c)	4
Title 18 U.S.C.A., Section 751	6
Title 18 U.S.C.A., Section 753	4
Title 18 U.S.C.A., Section 753a	4
Title 18 U.S.C.A., Section 753e	4
Title 18 U.S.C.A., Section 753f	4

No. 11,659

IN THE
United States Circuit Court of Appeals
For the Ninth Circuit

DORSEY McMAHAN,

Appellant,

vs.

JAMES A. JOHNSTON, Warden, United
States Penitentiary, Alcatraz Island,
California,

Appellee.

BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The method by which appellant (an inmate of the United States Penitentiary at Alcatraz Island, California) seeks to invoke the jurisdiction of the United States District Court for the Northern District of California, hereinafter called "the Court below", and the jurisdiction of this Honorable Court to review the decision of the Court below dismissing appellant's petition for mandatory relief directed against the appellee (the Warden of the said penitentiary), is set forth in the said appellant's jurisdictional statement on page one of his opening brief.

STATEMENT OF THE CASE.

The appellant, an inmate of the United States Penitentiary at Alcatraz Island, California, instituted an action in the nature of a petition for writ of mandamus to compel the appellee, the Warden of the said penitentiary, to transfer him to the Medical Center at Springfield, Missouri, from which institution he had escaped before being sent to Alcatraz, on the ground that he is insane, and on the further ground that he is not permitted to work in the prison because of his alleged mental incapacity. (Tr. 1-2.) An order to show cause thereupon issued (Tr. 3) and the appellee filed a motion to dismiss, asserting that the said petition failed to state a cause of action. (Tr. 6.) The appellant then filed a pleading which he entitled "Return on Motion to Dismiss Petition for Writ of Mandamus in case No. 27071-R". (Tr. 7-8.) The appellant also filed a request for appointment of counsel and a motion that the Warden produce him before the Court below for hearing, both of which motions were denied. (Tr. 4-5.) Thereafter the Court below entered the following order dismissing petition for writ of mandamus:

"The application of petitioner for a writ of mandamus to compel the respondent, the Warden of the United States Penitentiary at Alcatraz Island, California, to transfer him from the said institution to the Medical Center at Springfield, Missouri, on the ground that he is insane, is hereby denied.

It Is Further Ordered that the order to show cause, heretofore issued, be, and the same is,

hereby discharged. Such order is entered herein because federal prisons are but units of a single system under control of the Attorney General, who may transfer any prisoner from one institution to another for any reason sufficient to himself.

Zerbst v. Kidwell, 82 F. (2d) 756, reversed on other grounds, 304 U.S. 359;

Koehler v. Nicholson, 117 F. (2d) 344, 347.

Michael J. Roche,

United States District Judge.”

(Tr. pp. 9-10.)

From this latter order appellant appeals to this Honorable Court. (Tr. 11.)

QUESTION.

Does a United States Court have the power to order the Warden of a United States Penitentiary to transfer a prisoner to a Medical Center on the ground of the alleged insanity of the said prisoner?

CONTENTION OF APPELLEE.

The answer to the above stated question is: No.

ARGUMENT.

The appellee has narrowed the issues involved herein to the sole question as to whether a United States Court has the power to order the transfer of a

Although the United States has no statutory mandate directing the removal of a prisoner afflicted with a disease, to a place where his health will not suffer, the assistance of such a statute in Texas was held not to apply to one in legal custody after conviction.

Ex parte Smith, 64 S.W. 1052 (Tex.).

The appellant in his opening brief relies primarily on the case of

Coffin v. Reichard, CCA-6, 143 F. (2d) 443.

But this case on its facts does not have any application to our instant problem. This case merely held that prisoners under the control and in the custody of the United States are in the protection of the United States, upon which there is a co-extensive duty to protect against lawless violence, persons so detained, and a corresponding right on the part of these persons, secured by the constitution and laws of the United States, to be so protected. Excepting the fact that legal confinement does not deprive a prisoner of his other constitutional rights, there is no identity of facts between United States prisoners being subjected to violent cruelties and a United States prisoner, assumed to be insane, merely confined in a prison which is not primarily a medical institution. In this connection it should not be forgotten that under

Title 18 *U.S.C.A.*, Sec. 751,

the inmates of the United States Penitentiary at Alcatraz Island, California, are furnished with adequate medical care.

Congress has the power to make provisions for the proper care and treatment of federal prisoners during their imprisonment and to set up any form of administrative machinery that it deems necessary for such purpose.

Estabrook v. King, CCA-8, 119 F. (2d) 607.

And as above indicated, Congress has created an administrative body for such purpose under the Attorney General.

What constitutes an adequate penalty for an offense is a matter of legislative judgment and a Court will not interfere unless the penalty imposed is clearly and manifestly cruel and unusual.

Moore v. Aderhold, CCA-10, 108 F. (2d) 729.

Since no specific provision has been made by Congress for the care of federal prisoners who may be insane, it must follow that it is within the discretion of the Attorney General to act within his powers as to their care and custody. "Cruel and unusual punishment" usually implies something inhuman or barbarous and some punishment unknown at common law.

In re Pinaire, N.D. Tex. 46 F. Supp. 113.

In the problem at hand then, this Honorable Court, in order to reverse the order of the Court below, entered herein, would have to find that the incarceration of a federal prisoner assumed to be insane, in Alcatraz, is within such definition. This action of the Attorney General within his discretion, and impliedly



Title 18 U.S.C.A.

Section 753. *Bureau of Prisons; establishment, director, officers and employees.* There is established in the Department of Justice a Bureau of Prisons, to be in charge of a director, who shall be paid a salary at the rate of \$10,000 a year, and shall be appointed by and serve directly under the Attorney General. The officers and employees of the existing office of the Superintendent of Prisons; all official records, furniture, and supplies; and all of the authority, powers, and duties conferred by law or regulation upon the Superintendent of Prisons or any of his subordinates are hereby transferred to the Bureau of Prisons. The Attorney General shall have the power to appoint such additional officers and employees as may be necessary.

Title 18 U.S.C.A.

Section 753a. *Same; duties; military prisons.* The Bureau of Prisons shall have charge of the management and regulation of all Federal penal and correctional institutions and be responsible for the safekeeping, care, protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States: Provided, That the provisions of sections 753 and 753a-753j of this title shall not apply to military penal or military reformatory institutions or persons confined therein.

Title 18 U.S.C.A.

Section 753e. *Same; control and management; officers and employees; industries, farms, and other*

activities; classification and care of inmates. The control and management of any institutions established under sections 753c and 753d of this title, and the house of detention for Federal prisoners in New York City on the property 427-431 West Street, corner of Eleventh Street, New York City, shall be vested in the Attorney General, who shall have power to promulgate rules for the government thereof, and to appoint in accordance with the civil service laws and regulations all necessary officers and employees. In connection with such maintenance and operation the Attorney General is authorized to establish and conduct industries, farms, and other activities; to classify the inmates; and to provide for their proper treatment, care, rehabilitation and reformation.

Title 18 U.S.C.A.

Section 753f. *Commitment of persons by any court of the United States and the juvenile court of the District of Columbia; place of confinement; transfers.* All persons convicted of an offense against the United States shall be committed, for such terms of imprisonment as the court may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinement where the sentences of all such persons shall be served: Provided, That any sentence of imprisonment for an offense punishable by imprisonment for a term of one year or less shall not be served in a penitentiary except with the defendant's consent. The Attorney General may designate any available, suitable and appropriate institutions,

whether maintained by the Federal Government or otherwise or whether within or without the judicial district in which the person was convicted. The Attorney General is also authorized to order the transfer of any person held under authority of any United States statute from one institution to another if in his judgment it shall be for the well-being of the prisoner or relieve overcrowded or unhealthful conditions in the institution where such prisoner is confined or for other reasons. The authority conferred upon the Attorney General by this section shall extend to persons committed to the National Training School for Boys, by the Juvenile Court of the District of Columbia, as well as to those committed by any Court of the United States.

Title 18 U.S.C.A.

Section 751. *Medical service in Federal penal and correctional institutions; use of personnel of Public Health Service.* Authorized medical relief under the Department of Justice in Federal penal and correctional institutions shall be supervised and furnished by personnel of the Public Health Service, and upon request of the Attorney General, the Federal Security Agency shall detail regular and reserve commissioned officers of the Public Health Service, pharmacists, acting assistant surgeons, and other employees of the Public Health Service to the Department of Justice for the purpose of supervising and furnishing medical, psychiatric, and other technical and scientific services to the Federal penal and correctional institutions.

WITNESSES

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe

John Doe



